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Boraas v. Village of Belle Terre: The New, New Equal Protection

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NOTES

Boraas v. Village of Belle Terre: The New, New Equal Protection

I. THE *Boraas* CASE

In *Boraas v. Village of Belle Terre*[1] a group of unrelated college students who rented a home in Belle Terre challenged a zoning ordinance that limited home occupancy to persons related by blood, marriage, or adoption. The Court of Appeals for the Second Circuit, finding for the students, decided the case using a novel equal protection theory, and the Supreme Court reversed. This Note deals with the theory adopted by the Second Circuit, its sources, and its future in light of the subsequent Supreme Court opinion in *San Antonio Independent School District v. Rodriguez*[2] and the Supreme Court's analysis of *Boraas* under a more traditional standard.

The Village of Belle Terre is zoned exclusively for one-family dwellings. A "family" is defined as "[o]ne or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit... [A] number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family."[3] In January 1972, Edwin and Judith Dickman, owners of a single-family residence in Belle Terre, rented their house to six unrelated students attending a university located approximately seven miles from Belle Terre. On July 31, 1972, the Dickmans were ordered to remedy the ordinance violations.

On August 2, 1972, three of the students—Bruce Boraas, Anne Parish, and Michael Truman—and the Dickmans, filed an action in the district court under the Civil Rights Act of 1871[4] against the mayor and trustees of Belle Terre. They sought both injunctive relief against enforcement of the ordinance and a declaratory judgment invalidating as unconstitutional the ordinance's prohibition against

1. 476 F.2d 806 (2d Cir. 1973), *revd.*, 42 U.S.L.W. 4475 (U.S., April 1, 1974). Another case in which a federal court adopted a new equal protection test is Aiello v. Hansen, 359 F. Supp. 792 (N.D. Cal. 1973) (three-judge court), *prob. juris. noted sub nom.* Geduldig v. Aiello, 42 U.S.L.W. 3362 (U.S. Dec., 11, 1973) (No. 73-640).

2. 411 U.S. 1 (1973).

3. Belle Terre, N.Y., Building Zone Ordinance, art. I, § D-1.35a, June 8, 1970, *quoted in* 476 F.2d at 809. The enforcement provision of the ordinance provides: "Each violation of this ordinance shall constitute disorderly conduct." Punishment for a violation shall be by "a penalty not exceeding One Hundred Dollars ($100.00) or by imprisonment for a period not exceeding 60 days or by both such fine and imprisonment." Belle Terre, N.Y., Building Zone Ordinance, art VIII, part 4, § M-1.4a(2), Oct. 17, 1971, *quoted in* 476 F.2d at 809.

4. 42 U.S.C. § 1983 (1970).

residential occupancy by more than two unrelated persons.[5] The district court upheld the ordinance. On appeal, the Second Circuit reversed, Judge Timbers dissenting. Several weeks later a petition for a rehearing en banc was denied by a four-four vote.[6] Probable jurisdiction has been noted by the Supreme Court.[7]

Eschewing the Euclidean due process/police power analysis under which courts customarily review zoning ordinances,[8] the court of appeals decided the case under the equal protection clause.[9] Legislation undergoing equal protection review is generally analyzed under one of two standards, termed by the *Boraas* court the "minimal scrutiny test" and the "compelling state interest test."[10] Under the minimal scrutiny test, only a classification that is purely arbitrary,[11] lacking any reasonable connection between legislative means and ends, violates the clause.[12] The inquiry made by the court can be based on purely hypothetical justifications: "[A] statutory discrimination will not be set aside if any state of facts reasonably may be con-

5. The complaint alleged that the ordinance denied the plaintiffs equal protection of the laws, violated their right of association, intruded on their right of privacy, impinged upon their freedom to live with whom they pleased, and contravened their right to travel. 476 F.2d at 813.

6. 476 F.2d at 824.

7. 42 U.S.L.W. 3226 (U.S., Oct. 15, 1973). *Boraas* is not a typical exclusionary zoning case. The Belle Terre ordinance excludes certain groups of people, while the usual exclusionary zoning ordinance excludes certain types or sizes of buildings. *See, e.g.*, Vickers v. Township Comm., 37 N.J. 232, 181 A.2d 129 (1962), *appeal dismissed*, 371 U.S. 233 (1963) (mobile homes); Grish Appeal, 437 Pa. 237, 263 A.2d 395 (1970) (apartments); Lionshed Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953) (minimum dwelling size requirements). *See generally* Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971); Note, *The Equal Protection Clause and Exclusionary Zoning After Valtierra and Dandridge*, 81 YALE L.J. 61 (1971); Note, *The Constitutionality of Local Zoning*, 79 YALE L.J. 896 (1970). For a complete bibliography, see 22 SYRACUSE L. REV. 627 (1971).

8. The court described the traditional standard of review for zoning cases as follows:

> Where such regulations represent a valid exercise of delegated state police power and are designed to promote or protect the public health, safety or welfare, the individual's right must give way to the particular concern of the community. . . .
>
> . . . Ordinarily a court will intervene to declare a zoning ordinance to be a denial of due process only where it cannot be supported by a substantial public interest. Traditionally it may be justified by showing that it is related to such matters as safety, population density, adequacy of light and air, noise and necessity for traffic control, transportation, sewerage, school, park and other public services.

476 F.2d at 812, *citing* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Zahn v. Board of Public Works, 274 U.S. 325 (1927); Nectow v. City of Cambridge, 277 U.S. 183 (1928).

9. "To the requirement that zoning laws must satisfy due process, as thus enunciated by *Euclid* and its brethren, there must be added the important condition that they not discriminate in violation of the Equal Protection Clause." 476 F.2d at 813.

10. 476 F.2d at 814.

11. Under this standard the Court has upheld some classifications that appear arbitrary on their face. *See, e.g.*, Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Goesaert v. Cleary, 335 U.S. 464 (1948); Kotch v. Board of River Port Pilot Commrs., 330 U.S. 552 (1947).

12. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). The Supreme Court upheld the ordinance using this test. 42 U.S.L.W. at 4477.

ceived to justify it."[13] In the present case, the defendants argued that "the ordinance might conceivably be justified as a measure designed to curb population density and excessive rental costs, or to preserve the traditional family character of the neighborhood."[14] The compelling state interest test is of more recent vintage. If legislation impinges on an interest that is deemed "fundamental,"[15] or if the classification involved is "suspect,"[16] the challenged legislation will be sustained only if it is precisely tailored so as to accomplish the state's purpose,[17] less onerous means are not available,[18] and the state can demonstrate that the legislation is necessary to further a "*compelling* governmental interest."[19] The appellants claimed that the zoning ordinance interfered with a number of fundamental rights, including their rights of privacy, association, and travel, and stated that no compelling interest could justify the ordinance.[20] The court noted that recent efforts to augment the number of suspect classifications and fundamental interests had been unsuccessful[21] and that, while "the rights claimed by appellants are . . . more personal and basic in nature than those of commercial interests . . ., the present case [does not] fit snugly into any of the other categories recognized as requiring application of the compelling state interest test."[22]

13. McGowan v. Maryland, 366 U.S. 420, 425 (1961). *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 349 U.S. 483 (1955). *See generally* Tussman & ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

14. 476 F.2d at 813.

15. "Fundamental rights" include the right of personal privacy, Roe v. Wade, 410 U.S. 113 (1973); the right of interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969); the right to vote, Dunn v. Blumstein, 405 U.S. 330 (1972); the right to procreate, Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942); the rights guaranteed by the first amendment, Williams v. Rhodes, 393 U.S. 23 (1968); and, perhaps, the right to the essential facilities for prosecution of a criminal appeal, Griffin v. Illinois, 351 U.S. 12 (1956).

16. "Suspect classifications" include classifications based on race, McLaughlin v. Florida, 379 U.S. 184 (1964); alienage, Graham v. Richardson, 403 U.S. 365 (1971); ancestry, Oyama v. California, 332 U.S. 633 (1947); and, at least when there is a total deprivation of an important entitlement, wealth, Rodriguez v. San Antonio Independent School Dist., 411 U.S. 1, 20 (1973).

17. *E.g.*, Dunn v. Blumstein, 405 U.S. 330, 351-52, 357-58 (1972); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 632 (1969).

18. *E.g.*, Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

19. Dunn v. Blumstein, 405 U.S. 330, 342 (1972), *quoting* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis original).

20. The Supreme Court rejected these arguments. 42 U.S.L.W. at 4477. They are expounded in Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Comment, *All in the "Family": Legal Problems of Communes*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 393 (1972). Sager was of counsel to the petitioners in *Boraas*.

21. 476 F.2d at 813, *citing* Lindsey v. Normet, 405 U.S. 56 (1972) (housing); Dandridge v. Williams, 397 U.S. 471 (1970) (welfare benefits). *See also* United States v. Kras, 409 U.S. 434 (1973) (no fundamental right to a discharge in bankruptcy).

22. 476 F.2d at 813-14.

The court did not, however, directly reject the appellants' arguments. It professed to be relieved that it did not have to decide if there had been an infringement of the right of privacy or travel and proceeded to enunciate its own standard of review, a third equal protection formula falling somewhere between the two traditional tests:

> [W]e believe that we are no longer limited to the either-or choice between the compelling state interest test and the minimal scrutiny permitted by the *Lindsley-McGowan* formula. . . . [T]he Supreme Court appears to have moved from this rigid dichotomy, sometimes described as a "two-tiered" formula, toward a more flexible and equitable approach, which permits consideration to be given to evidence of the nature of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest urged in support of it. Under this approach the test for application of the Equal Protection Clause is whether the legislative classification is *in fact* substantially related to the object of the statute. . . . If the classification, upon review of facts bearing upon the foregoing relevant factors, is shown to have a substantial relationship to a lawful objective and is not void for other reasons, such as overbreadth, it will be upheld. If not, it denies equal protection.[23]

Several recent Supreme Court decisions were cited as authority for this new standard of review.[24] Also cited was a law review article by Professor Gerald Gunther,[25] which propounds a model for a new equal protection standard that focuses on the degree to which legislative means further legislative ends.[26]

As described by the *Boraas* court, the new standard of review has two elements. First, a court should scrutinize the legislative means to determine if, based on the actual facts before the court, they further the legislative ends. Judges should no longer strain to find a hypothetical set of facts that could conceivably show a rational relationship

23. 476 F.2d at 814 (emphasis original).

24. 476 F.2d at 814, *citing* Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971); James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972). Judge Timbers cited additional decisions in his dissenting opinion. 476 F.2d at 819 n.1 *citing* Police Dept. v. Mosley, 408 U.S. 92 (1972); Humphrey v. Cady, 405 U.S. 504 (1972).

25. Gunther, *The Supreme Court, 1971 Term—Foreword, In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1 (1972).

26. This article appears to be the primary source of the explicit standard enunciated in *Boraas*. *See* text accompanying notes 56-61 *infra*. In two earlier cases in which Second Circuit panels discussed "new equal protection" standards, Professor Gunther's article was the chief authority cited. *See* Aguayo v. Richardson, 473 F.2d 1090, 1109 (1973), *cert. denied*, 42 U.S.L.W. 3406 (U.S., Jan. 14, 1974); City of New York v. Richardson, 473 F.2d 923, 931 (1973). *See also* Green v. Waterford Bd. of Educ., 473 F.2d 629, 632 n.3, 633 n.8 (1973). None of these opinions is cited in *Boraas*. Judge Mansfield does refer to them, however, in his reply to Judge Timber's dissent from the denial of a rehearing en banc. *See* 476 F.2d at 828 n.3.

between means and ends. The court described the degree to which means must relate to ends as "substantial." It is not apparent what degree of connection is required or whether there are any objective criteria which a court could use to determine whether a substantial relationship to a lawful objective exists.[27]

The second element is found in the court's statement that "[the new approach] . . . permits consideration to be given to evidence of the nature of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest urged in support of it."[28] This seems to suggest a balancing or sliding-scale approach. The degree of scrutiny of the means chosen would depend upon the relative significance attached by a reviewing court to the rights allegedly affected and the governmental interest asserted.[29] When challenged by the dissenting opinion,[30] however, the majority denied that a balancing approach was intended:

> We disagree with our Brother Timbers' interpretation of our decision as requiring the court to apply a flexible standard based upon balancing . . . . [T]he court is required to determine whether the legislative classification *in fact* (rather than hypothetically) has a substantial relationship to lawful objective. That determination of necessity requires the court to consider evidence of the nature of the classification under attack, the rights adversely affected and the governmental interest in support of it.[31]

The presence in the case of alleged associational rights may have influenced the high degree of scrutiny actually adopted,[32] but, as the court applied its standard, it is difficult to see exactly how evidence of the nature of competing considerations affected the court's ruling

27. In support of its standard the court cited language from Reed v. Reed, 404 U.S. 71, 76 (1971): " 'The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective. . . .' " 476 F.2d at 815. The *Boraas* court's extrapolation from "rational" to "substantial" may not be altogether unfounded. *See* text accompanying notes 115-16 *infra*.

28. 476 F.2d at 814.

29. There are hints of support in recent Supreme Court opinions for such a standard. *See* Police Dept. v. Mosley, 408 U.S. 92, 95 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172-73 (1972); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting). *See generally* Comment, *Fundamental Personal Rights: Another Approach to Equal Protection*, 40 U. CHI. L. REV. 807 (1973); Note, *The Decline and Fall of the New Equal Protection: A Polemical Approach*, 58 VA. L. REV. 1489 (1972). A number of opinions applying strict judicial scrutiny have adopted this approach as an aspect of the decision-making process. *E.g.*, Williams v. Rhodes, 393 U.S. 23, 30 (1968); Dunn v. Blumstein, 405 U.S. 330, 335 (1972).

30. 476 F.2d at 821.

31. 476 F.2d at 815 n.8 (emphasis original).

32. Certain of the cases that the *Boraas* court drew on as support for the new equal protection test arguably applied a heightened standard of review when possible new fundamental rights were present, rather than forthrightly recognizing the right as fundamental. *See text* accompanying notes 160-61 *infra*.

on the substantial relation between legislative means and ends, since the importance of the competing public and private interests was never discussed.

After describing the new standard, the *Boraas* court considered the merits of the case. The district court had found that the purpose of the zoning ordinance was to preserve a legally protectable, affirmative interest of the community in the traditional marriage and in the blood-related family unit.[33] In the opinion of the appellate court, this goal "fail[ed] to fall within the proper exercise of state police power";[34] the objective was a "social preference . . . hav[ing] no relevance to public health, safety or welfare . . .,"[35] "exclud[ing] from the community, without any rational basis, unmarried groups seeking to live together . . . ."[36] The court then stated that, even assuming that "a social predilection in the form of entrenched traditional family units"[37] was a valid zoning objective, there was no "shred of rational support for the means used here to achieve that end,"[38] because "[i]t is not suggested that appellants or unrelated groups functioning as a single housekeeping unit, endanger the health, safety, morals or welfare of existing residents of the community."[39]

The court then turned to the village's argument that the ordinance could be sustained by looking to traditionally recognized zoning objectives, specifically control of population density, avoidance of rent inflation, and prevention of traffic, parking, and noise problems. The court readily admitted that these are all legitimate police power objectives but found no rational relationship between these goals and the ordinance:

> Upon the record before us . . . we fail to find a vestige of any such support [for these hypothesized objectives]. To theorize that groups of unrelated members would have more occupants per house than would traditional family groups or that they would price the latter

33. 476 F.2d at 815.

34. 476 F.2d at 815. The Supreme Court found that to enhance "family values . . . and the blessings of quiet seclusion" is within the state's police power. 42 U.S.L.W. at 4477.

35. 476 F.2d at 815.

36. 476 F.2d at 816. Other courts, however, have held that this is a legitimate governmental goal. *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1879); Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908 (N.D. Cal. 1970).

The Supreme Court has mentioned the importance of the traditional family unit and has sanctioned classifications that affirmatively promote it. *See* McGowan v. Maryland, 366 U.S. 420 (1961); Griswold v. Connecticut, 381 U.S. 479 (1965). The recent case of *In re* Statham, 483 F.2d 436 (9th Cir. 1973), *cert. denied*, 42 U.S.L.W. 334 (U.S., Nov. 21, 1973), upheld federal bankruptcy exemptions granted to married but not unmarried persons. The court assumed without discussion that protection of the family unit in this context was a legitimate statutory objective.

37. 476 F.2d at 816.

38. 476 F.2d at 816.

39. 476 F.2d at 816.

> out of the market or produce greater parking, noise or traffic problems, would be rank speculation, unsupported either by evidence or by facts that could be judicially noticed.[40]

The court did not expressly link this language to its previous enunciation of a new standard of review, but the statement that "[t]o theorize . . . would be rank speculation, unsupported . . . by evidence" appears to require that the legislative classification be substantially related in fact to the statute's objective; it suggests that a court should not hypothesize a set of facts supplying the requisite relationship, as is commonly done under the minimal scrutiny test. The court went on to quote language by the Supreme Court of Illinois, which, in *City of Des Plaines v. Trottner*,[41] considered an identical ordinance:

> "Family groups are mobile today, and not all family units are internally stable and well-disciplined. Family groups with two or more cars are not unfamiliar. And so far as intensity of use is concerned, the definition in the present ordinance, with its reference to the 'respective spouses' of persons related by blood, marriage or adoption, can hardly be regarded as an effective control upon the size of family units."[42]

This analysis could be fitted into the new standard of review, which attempts to determine the factual connection between legislative means and ends. It should be noted, however, that such an analysis would also be appropriate under the minimal scrutiny test, where it could be used to ascertain if a classification is purely arbitrary.

Up to this point, the *Boraas* court's analysis accords fairly well with its announced standard (although there has been no overt comparison of competing interests). But the court apparently did not feel that the arguments from *Trottner* settled the case, because it immediately plunged off in a new direction: It considered whether the ordinance was "too sweeping, excessive and over-inclusive" since the same goals (deintensification of land use and of noise, and parking and traffic control) could be accomplished by legislative action that would avoid discrimination against nonconsanguineous groups.[43] The court explained itself with the following examples:[44] A simple way of maintaining population density at the level of traditional family units would be to regulate the number of bedrooms in a dwelling structure. Public and private nuisance laws adequately prevent excessive noise by occupants. Rent controls best deter rent inflation. Traffic or parking problems can be handled most directly by restricting the number of cars per dwelling unit.

Since the court felt compelled to suggest more efficacious legisla-

40. 476 F.2d at 816. *But see* 42 U.S.L.W. at 4477.

41. 34 Ill. 2d 432, 216 N.E.2d 116 (1966).

42. 476 F.2d at 817, *quoting* 34 Ill. 2d at 434, 216 N.E.2d at 119.

43. 476 F.2d at 817.

44. 476 F.2d at 817.

tive means to accomplish the same ends, it seems to admit that the ordinance has at least some rational relationship to concededly valid zoning objectives. This concession indicates that the court adopted the less onerous means analysis as a ground for its decision.

There are several problems with using a less onerous means analysis. First, it goes beyond the court's avowed standard of determining "whether the legislative classification is in fact substantially related to the object of the statute." The court's actual reasoning can be used to strike down any classification that has a substantial means-end relationship if another classification is in fact more substantially related to the end. If the court is using two separate tests,[45] the less onerous means analysis may swallow the substantially related analysis.

Second, the less onerous means approach has traditionally been reserved for cases involving impingement upon fundamental rights, particularly first amendment freedoms.[46] The *Boraas* court had explicitly stated that it was not ruling on the petitioners' claim that their rights to privacy and association were adversely affected, but it cited no authority for applying this approach where fundamental rights were not at stake.[47]

The court closed its opinion with a brief section stating that "the discriminatory classification created by the Belle Terre ordinance does not appear to be supported by any *rational* basis that is consistent with permissible zoning objectives."[48] This holding leaves the exact

45. The court did not explicitly state that it was applying a dual standard, although it did say that "[i]f the classification, upon review of facts bearing upon the foregoing relevant factors, is shown to have a substantial relationship to a lawful objective *and is not void for other reasons, such as overbreadth*, it will be upheld." 476 F.2d at 814 (emphasis added).

However, the tests were treated separately in that no attempt was made to relate the less onerous means discussion to the stated substantial relationship test. This could have easily been done by finding that, because certain zoning objectives could be accomplished by less discriminatory means, the relationship was not substantial. Nor did the court attempt to relate the less onerous means discussion to traditional equal protection standards by finding that, because certain zoning objectives could be accomplished more directly, the classification was arbitrary. The court may have meant to do this implicitly. See note 47 *infra* and text accompanying notes 237-43 *infra*. A general difficulty with the opinion is that the enunciated standard of review is never explicitly linked to the discussion of the merits.

46. *E.g.*, United States v. Robel, 289 U.S. 258 (1967); Thornhill v. Alabama, 310 U.S. 88, 102 (1940); Schneider v. State, 308 U.S. 147, 162 (1939). *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970). Certain strict scrutiny equal protection decisions have also asked whether less onerous means were available to achieve the statutory purpose. *E.g.*, Shapiro v. Thompson, 394 U.S. 618, 635, 637 (1969); Dunn v. Blumstein, 405 U.S. 330, 353 (1972).

47. The only case cited was Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, A.2d 513 (1971), discussed in the text accompanying notes 237-41 *infra*. *See* 476 F.2d at 817. That case struck down a similar zoning ordinance that "preclude[d] so many harmless dwelling uses, . . . that [it] must be held to be sweepingly excessive [and] legally unreasonable." 59 N.J. at 250-51, 281 A.2d at 518. The New Jersey court concluded that the zoning ordinance was outside the scope of the police power.

48. 476 F.2d at 818 (emphasis added).

standard of review employed in considerable doubt. The language would fit within the traditional equal protection test, but the degree of scrutiny employed by the court, particularly in its discussion of less onerous means, far exceeds the intensity of review under the old equal protection. Nor does the court explain how its bare holding of no "rational" relationship differs from, is similar to, or encompasses the no "substantial relationship" language of its test.

Judge Timbers dissented. He agreed with the majority that the Supreme Court appeared to be moving toward a new standard of review but disagreed with some aspects of the majority's test, particularly the statement that "the nature of the rights adversely affected" should in part determine the degree of rationality required.[49] He stated his view of the applicable standard:

> The recent Supreme Court decisions, in my view, require a judge to make only the narrow value judgments needed in evaluating means. A legislative classification must contribute substantially to the achievement of the state's purpose. . . . This would indicate that grossly overinclusive or underinclusive classifications should not be readily tolerated. Nor should a reviewing court defer to imaginable facts that might justify the classification. But account should be taken of legislative realities and the need for legislative flexibility. In short, a legislature should be able to adopt any means that are reasonably effective in achieving a valid legislative end or ends.[50]

Moving to the merits, Judge Timbers disagreed with the majority's position that maintenance of the one-family character of the village was not a legitimate zoning objective and went on to find the legislative means employed "rationally related" to this objective.[51] He found it unnecessary, however, to decide the case on this ground because the ordinance was rationally related to control of population density, avoidance of rent inflation, and prevention of parking, traffic, and noise problems, all recognized zoning objectives.[52] He viewed the majority's discussion, particularly its suggestion of less onerous means, as "reminiscent of the 'strict scrutiny' test, which . . . is inapplicable here."[53] He concluded, "The fact that the means selected by the Village may not have been the most efficient or the least intrusive of those available is legally immaterial under the means-scrutiny test. If the means selected contributes substantially to the end, the equal protection clause has not been violated."[54]

The most interesting feature of the *Boraas* opinion is its declama-

49. For the majority's response, see text accompanying note 31 *supra*.

50. 476 F.2d at 821-22.

51. 476 F.2d at 823.

52. 476 F.2d at 823-24.

53. 476 F.2d at 824.

54. 476 F.2d at 824.

tion of a new equal protection test. The decisions cited by the court lend some support to the notion of an intermediate equal protection standard, but subsequently decided cases cast doubt on the vitality of any such test.

II. Possible Antecedents

A. *The Gunther Article*

While the *Boraas* court cites seven Supreme Court cases as precedent, [55] the language of its standard was drawn from Professor Gunther's law review article.[56] He describes his new equal protection as a

> means-focused, relatively narrow, preferred ground[57] of decision in a broad range of cases. Stated most simply, it would have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends. . . . [E]xtreme deference to imaginable supporting facts and conceivable legislative purposes was characteristic of the "hands off" attitude of the old equal protection. Putting consistent new bite into the old equal protection would mean that the Court would be less willing to supply justifying rationales by exercising its imagination. It would have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture.[58]

So far, the model is by and large equivalent to the stated test in *Boraas*, where the court required a substantial relation between the classification and the objective. At one point in the opinion, the court

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55. *See* note 24 *supra*.

56. *See* note 25 *supra*.

57. By "preferred ground" of decision, Gunther means that a court should adopt this equal protection test instead of dealing with more difficult issues that might be posed by an alternate standard. *See* Gunther, *supra* note 25, at 22. *See also* Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtue*, 75 Harv. L. Rev. 40 (1961); Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judical Review*, 64 Colum. L. Rev. 1, 20-21 (1964).

Professor Gunther finds a philosophical basis for the new test as a "preferred ground" of decision in Justice Jackson's concurring opinion in Railway Express Agency, Inc. v. New York, 336 U.S. 106, 111-13 (1949). Justice Jackson noted that the equal protection clause was to be preferred over the due process clause when dealing with substantive legislation because invalidation under the due process clause "leaves ungoverned and ungovernable conduct which many people find objectionable," while "[i]nvocation of the equal protection clause . . . does not disable any governmental body from dealing with the subject at hand." 336 U.S. at 112. It only asks that the legislature redraw classifications so as to avoid a discriminatory impact.

It should be noted, however, that some authorities have questioned the aggressive use of the equal protection clause. *See, e.g.*, A. Bickel, The Supreme Court and the Idea of Progress (1970); Dienes, *To Feed the Hungry: Judicial Retrenchment in Welfare Adjudication*, 58 Calif. L. Rev. 555 (1970); Kurland, *Egalitarianism and the Warren Court*, 68 Mich. L. Rev. 629 (1970).

58. Gunther, *supra* note 25, at 20-21.

rejected a proposed justification for the ordinance because "[u]pon the record before us . . . we fail to find a vestige of any such support" that would establish a substantial relationship between the proposed objectives and the classification.[59] The court was unwilling to provide its own set of justifying facts, as it might have done under the minimal scrutiny test. But Gunther proceeds,

> [T]he strengthened "rationality" scrutiny would curtail the state's choice of means far less severely than the [strict scrutiny] approach. The Warren Court's strict scrutiny repeatedly asked whether the means were "necessary" and whether "less drastic means" were available to achieve the statutory purpose. . . . The more modest interventionism . . . would permit the state to select any means that substantially furthered the legislative purpose.[60]

The *Boraas* majority's approach is not consistent with this formulation, for a discussion of less onerous means occupied a major part of that opinion. The court also did not reply to the dissent's charge, echoing Gunther, that the less onerous means test smacked of the very strict scrutiny approach that the majority had ostensibly rejected.[61] Obviously, the majority parted company with Professor Gunther on this point.

In general, Professor Gunther's model seems more restrained than the review adopted in *Boraas*. His test differs from the minimal scrutiny standard chiefly in rejecting an utterly deferential attitude toward legislative classifications. *Boraas*, while adopting much of the wording of Gunther's model, engaged in much broader review. Objectives, as well as means, were scrutinized, and a whole series of alternate approaches were suggested. Nor does Gunther mention judicial weighing of the relative importance of personal rights and legislative interests as an aspect of decision-making under the test. The source of the court's standard apparently lies elsewhere.

B. *The Cases Cited by the Boraas Court*

The Supreme Court cases cited in *Boraas* were ostensibly decided under the minimal scrutiny test, and none contains an overt formulation of a new test. While most of the cases can be read as fitting into traditional patterns of decision, several of the cases arguably reach results, and contain analysis, reflecting a middle-ground equal protection review.

In *Jackson v. Indiana*,[62] the Court unanimously ruled that the

59. 476 F.2d at 816. The court did not rest its decision on the lack of an evidentiary foundation, for it immediately proceeded to analyze the proposed objectives, first in terms of arbitrariness of classification, and then in regard to possible utilization of less onerous means.

60. Gunther, *supra* note 25, at 21.

61. 476 F.2d at 824; Gunther, *supra* note 25, at 21.

62. 406 U.S. 715 (1972).

Indiana pretrial commitment procedures for mentally incompetent criminal defendants violated the equal protection clause. Jackson, a mentally defective deaf mute with the mental level of a preschool child, had been charged with two robberies, but before his trial the trial court had set in motion the Indiana procedures for determining his competence to stand trial. After a competency hearing the court found that Jackson could not understand his defense and ordered him committed until certified sane. Indiana's statutory commitment procedures for noncriminals contained more stringent commitment standards and more lenient release standards than those adopted for incompetent criminal defendants like Jackson. The state tried to justify the more stringent safeguards for noncriminals by arguing that Jackson's commitment was only temporary, for he could stand trial when sane, while commitment of noncriminal "feeble-minded" persons was for an indefinite period. The Supreme Court agreed that, if the state's premise was correct, there might be a valid distinction, but the Court cited medical testimony from the record[63] to the effect that it was unlikely that Jackson's condition would ever improve. Thus, the duration of his commitment was indeterminate, exactly like commitment for noncriminal mental incompetents.

Willingness to look to the record to ascertain if there is a factual basis for differing treatment of classes is a hallmark of the equal protection test described in *Boraas*. Even under minimal scrutiny, however, a court will look to the record where suppositions are conclusively provable in this way, before it accepts a hypothetical argument that may be true in some cases but is not in the case under consideration.[64]

Once the *Jackson* Court had determined that mentally incompetent criminal defendants were subjected to different commitment standards than noncriminal mental defectives, the case was decided on the basis of precedent. *Baxstrom v. Herold*[65] had held that a state prisoner who was civilly committed at the conclusion of his prison term solely on the finding of a judge was denied equal protection in that he was not allowed the jury trial provided to all others persons civilly committed. The state was forbidden to withold from one class the procedural protections available to all others. The *Jackson* Court reasoned that "[i]f criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot suffice."[66]

63. 406 U.S. at 725-26.

64. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938): "[T]he existence of facts supporting the legislative judgment is to be presumed, . . . unless in the light of the facts made known or generally assumed it is of such character as to preclude the assumption that it rests upon some rational basis."

65. 383 U.S. 107 (1966).

66. 406 U.S. at 724.

Baxstrom had been a "no rational basis" decision, and the differences in procedure in that case were termed capricious.[67] Thus, although a tendency toward increased judicial reliance on the factual basis for the differing treatment of similarly situated groups is illustrated by *Jackson*, notably in its rejection of the argument that Jackson was only committed "until sane," the case is merely an extension of *Baxstrom*, a minimal scrutiny case that contains none of the "new equal protection" tendencies. In itself, *Jackson* hardly portends a new doctrinal trend.[68]

Humphrey v. Cady[69] involved facts similar to *Jackson*. Humphrey had been convicted of contributing to the delinquency of a minor and, in lieu of a jail sentence, had been committed to a "sex deviate facility" pursuant to the Wisconsin Sex Crimes Act. Although the maximum sentence for his crime was one year, Humphrey's confinement was potentially indefinite, as the state could petition for five-year renewals of commitment. Under Wisconsin's mental health statute jury determinations precede commitment; no opportunity for a jury trial was allowed under the state's Sex Crimes Act. The Court's finding that commitment for treatment under both statutes involved precisely the same kind of determinations squarely posed the question raised in *Baxstrom* of what justification the state could provide for the differing treatment of seemingly identically situated classes. The case was remanded for an evidentiary hearing, partly to determine if there was any basis for the differing procedures, such as a special characteristic of sex offenders that might render a jury determination inappropriate.[70] Since the Court did not rule on the possible grounds for justifying the disparate treatment under the two statutes, there is no opportunity to see what degree of factual connection would have been required to explain the divergent procedures. Thus, the case does not directly consider whether there was a substantial relationship in fact between legislative classification and objective.

However, the Court's refusal to hypothesize a situation where there would be a rational distinction between sex offenders and other offenders was striking. The minimal scrutiny standard would seem to require such judicial hypothesizing.[71] The remand to determine if a possible distinction exists tends to support the *Boraas* position that factual grounds should support the classification and suggests that something more than the rational basis test was applied in *Humphrey*.

67. 383 U.S. at 115.

68. The Court also found procedural due process violations. Professor Gunther notes an "avoidance principle" at work in *Jackson*, in that basing the decision on equal protection grounds made it unnecessary for the Court to rule on petitioner's claim that detention of a sick individual violated the eighth amendment. *See* Gunther, *supra* note 25, at 28.

69. 405 U.S. 504 (1972).

70. 405 U.S. at 512.

71. *See* text accompanying note 13 *supra*.

Police Department v. Mosley[72] involved a city ordinance prohibiting picketing within 150 feet of a school building. The ordinance excepted peaceful labor picketing from the ban. The Court seized on the distinction between labor picketing and all other picketing and found the ordinance unconstitutional on equal protection grounds. The Court noted, however, that "the equal protection claim in this case [was] closely intertwined with First Amendment interests,"[73] and much of Justice Marshall's opinion for the Court dealt with these interests. Agreeing that a state can regulate the time, place, and manner of picketing, he noted that the ordinance attempted to regulate picketing according to the content of the message since the exception to the regulation—labor picketing—differed from other picketing only on the basis of the subject matter of the picket signs. This was found unconstitutional: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[74]

Justice Marshall returned to equal protection analysis only after virtually deciding the case on first amendment grounds. At the outset of the opinion he had said, "As in all equal protection cases . . . the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment,"[75] but after the first amendment discussion he modified the standard, saying that "there may be sufficient regulatory interests justifying selective exclusions or distinctions among pickets. . . . But these justifications for selective exclusions from a public forum must be carefully scrutinized. Because picketing plainly involves expressive conduct within the protection of the First Amendment, . . . discriminations among pickets must be tailored to serve a substantial governmental interest."[76] This language conforms, by and large, to the rubric of the compelling interest test, which, indeed, is appropriate in the *Mosley* situation, where a fundamental right was being impinged upon by state regulation.[77]

Justice Marshall dismissed the city's purported justifications rather preemptorily. The city had argued that the purpose of the ordinance was to prevent school disruptions, but the Court observed that peaceful labor picketing and peaceful nonlabor picketing are equally

72. 408 U.S. 92 (1972).

73. 408 U.S. at 95.

74. 408 U.S. at 95, *citing, inter alia,* Street v. New York, 394 U.S. 576 (1969); New York Times v. Sullivan, 376 U.S. 254 (1964). The case of Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), in which the Court drew a distinction between picketing in a labor context and all other picketing on private property, was not mentioned.

75. 408 U.S. at 95.

76. 408 U.S. 98-99.

77. A right is fundamental for equal protection purposes if it is "explicitly or implicitly guaranteed by the Constitution." Rodriguez v. San Antonio Independent School Dist., 411 U.S. 1, 33-34 (1973).

nondisruptive.[78] The Court disposed of the further argument that nonlabor picketing as a class tended to be more violence-prone than labor picketing by saying that, where freedom of expression was at stake, such value judgments had to be made on an "individualized basis," not in the form of broad classifications.[79]

Mosley engages in extensive scrutiny; after all, allowing one type of picketing that could conceivably be deemed peculiarly nondistracting does have some relation to the admittedly legitimate objective of preventing school disruption. However, as pointed out above, such a degree of scrutiny is justifiable because a fundamental interest protected by the first amendment was at stake.

While most of the opinion dealt with the first amendment aspects of the case, the broad statement that "[i]n all cases the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment"[80] is noteworthy from an equal protection standpoint, for it avoids any reference to the minimal scrutiny/strict scrutiny dichotomy. This omission may indicate that the opinion could be analyzed as taking a sliding-scale approach, rather than applying strict scrutiny, as it at first appears to do.[81] Justice Marshall's language may be the source of the *Boraas* majority's statement that "consideration [is] to be given to evidence of the nature of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest urged in support of it,"[82] although the *Boraas* court explicitly denied adopting a sliding-scale approach. However, *Mosley*, read either as a strict scrutiny case or as an attempt to formulate a broad doctrine applicable in all equal protection cases, does not adopt a third, intermediate standard of review.

In *Weber v. Aetna Casualty & Surety Co.*[83] Justice Powell, writing for eight members of the Court, found that Louisiana's denial of equal recovery rights under state workmen's compensation law to unacknowledged, dependent, illegitimate children denied these children equal protection of the law. In language somewhat similar to that in *Mosley*, the Court delivered a broad summation of equal protection theory:

> The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court

78. 408 U.S. at 100.

79. 408 U.S. at 100-01.

80. *See* text accompanying note 75 *supra*.

81. Such an approach is advocated in a number of Justice Marshall's dissenting opinions. *See* Rodriguez v. San Antonio Independent School Dist., 411 U.S. 1, 98-110 (1973); Dandridge v. Williams, 397 U.S. 471, 519-21 (1970). *See also* Dunn v. Blumstein, 405 U.S. 330, 335 (1972) (Marshall, J., dissenting); note 197 *infra*.

82. *See* text accompanying note 23 *supra*.

83. 406 U.S. 164 (1972).

> requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose. . . . Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny. . . . The essential inquiry in all of the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?[84]

This passage can be read as an attempt to formulate an equal protection test applicable in all cases. The degree of judicial scrutiny would be determined by balancing the importance of the "legitimate state interest" that is allegedly promoted with the allegedly endangered "fundamental personal rights." The fact that the Court did not explicitly adopt a two-tiered approach supports the notion that the passage describes a single, over-arching test. However, an equally possible reading is to consider the quotation to be a broad restatement of the bifurcated equal protection approach. Minimal and strict scrutiny cases are separately demarcated, and the reference to an "inevitable inquiry" involving state interests and fundamental personal rights can be explained in traditional terms: The nature of the personal right involved is investigated to determine the proper tier, and the state interest is investigated in applying either test. Even assuming the first reading to be accurate, however, the balancing standard described in *Weber* differs markedly from the test employed in *Boraas*, for it emphasizes the scrutiny of ends rather than of means so that the importance of the state interest is the pivotal factor in determining the level of review.

The *Weber* Court's application of its test seemed to suggest that minimal scrutiny was adopted. The Court recognized legitimate state interests in "protecting legitimate family relationships"[85] and in minimizing potentially difficult proof problems under Louisiana's Workmen's Compensation Act[86] but stated that the discriminatory classification did not promote either objective: "[It cannot] be thought here that persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation. . . . Our decision . . . will not expand claimants for workmen's compensation beyond those in a direct blood and dependency relationship with the deceased . . . ."[87] But the Court's analysis concludes, "The inferior classification of dependent unacknowledged illegitimates bears, in this instance, no *significant* relationship to those recognized

84. 406 U.S. at 172-73.
85. 406 U.S. at 173.
86. 406 U.S. at 174.
87. 406 U.S. at 173-75.

purposes of recovery which workmen's compensation statutes commendably serve."[88]

The Court's reference to a significant, rather than a rational, relationship indicates that it was applying some form of heightened review[89] and seems to suggest a particular sensitivity to illegitimacy as a classification. This is not surprising, since illegitimacy bears many of the hallmarks—including group stigmatization, a history of discrimination, and ready identifiability—of recognized suspect classifications.[90] The *Weber* Court seemed to recognize the suspect nature of the class when it noted that "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . ."[91] The Court, in a later case,[92] appeared to reaffirm the view that illegitimacy is a suspect classification when it stated with regard to paternal support that "[w]e therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother."[93] Thus, *Weber* can best be explained as the judicial recognition of illegitimacy as a suspect classification and, therefore, may not offer much support for the *Boraas* test.

Both Judge Timbers, in his dissent in *Boraas*, and Professor Gunther consider *James v. Strange*[94] to be the best example of the new equal protection.[95] *James* found Kansas' method of recouping legal defense fees expended for indigent defendants to be unconstitutional. Under the recoupment procedure, the former defendant was denied certain exemptions, including protection from wage garnishments, available to all other civil debtors.[96] The Court, quoting from *Rinaldi v. Yeager*,[97] stated that

> the Equal Protection Clause "imposes a requirement of some rationality in the nature of the class singled out." . . . This requirement

88. 406 U.S. at 175 (emphasis added).

89. The Court also rejected one state justification because "it is not *compelling* in a statutory compensation scheme where dependency on the deceased is a prerequisite to anyone's recovery . . . ." 406 U.S. at 173 (emphasis added).

90. *See* Graham v. Richardson, 403 U.S. 365 (1971) (alienage as a suspect class); McLaughlin v. Florida, 379 U.S. 184 (1964) (race as a suspect class); Oyama v. California, 332 U.S. 633 (1948) (ancestry as a suspect class).

91. 406 U.S. at 175.

92. Gomez v. Perez, 409 U.S. 535 (1973) (per curiam).

93. Gomez v. Perez, 409 U.S. 535, 538 (1973) (per curiam).

94. 407 U.S. 128 (1972).

95. *See* 476 F.2d at 820; Gunther, *supra* note 25, at 33.

96. The Court has recently shown a notable solicitude in regard to limiting the more draconian effects of creditor remedies. *See* Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

97. 384 U.S. 305 (1966).

> is lacking where, as in the instant case, the State has subjected indigent defendants to such discriminatory conditions of repayments. . . . [T]o impose these harsh conditions on a class of debtors who were provided counsel as required by the Constitution is to practice . . . a discrimination which the Equal Protection Clause proscribes.[98]

The Court agreed that the state had a legitimate interest in regaining the expended funds[99] but cited no state argument in support of the distinction between the two classes of debtors.

It is important to note that the Court departed from traditional minimal scrutiny review in that it did not feel compelled to supply a justification.[100] The Court might have, for instance, suggested that indigent criminal defendants are arguably more prone to conceal assets than are civil debtors and, hence, should not receive the benefits of the exemption statutes. While *James* drew on *Rinaldi v. Yeager*, a minimal scrutiny decision that held that a New Jersey statute requiring only those indigent defendants who were sentenced to prison terms to reimburse the state for the cost of transcripts on appeal, in *Rinaldi*, unlike *James*, the Court considered a series of hypothetical legislative purposes before striking down the classification as having no rational relationship to any proposed objective.[101] The level of review in *James* is thus more stringent than conventional minimal scrutiny.

James also illustrates Gunther's "preferred ground" approach.[102] The district court had held the Kansas statute invalid as placing an impermissible burden on the constitutionally guaranteed right to counsel.[103] By deciding the case on equal protection grounds, the Court avoided the difficult question of the constitutional validity of any state recoupment procedure.[104]

Professor Gunther comments on the case:

> Justice Powell perceived the readily apparent dissimilarity between indigent defendants and other judgment debtors with respect to exemptions; encountered no articulated state ground for the difference; refused to strain his imagination to supply that missing explanation; and accordingly found that the "some rationality" requirement had not been met. Justice Powell was plainly unwilling

98. 407 U.S. at 140-41, *quoting* 384 U.S. at 308-09.

99. 407 U.S. at 141.

100. *See* text accompanying note 13 *supra*.

101. 384 U.S. at 309-10.

102. *See* note 57 *supra*.

103. Strange v. James, 323 F. Supp. 1230 (D. Kan. 1971) (three-judge court).

104. The right to counsel in criminal cases is guaranteed by Gideon v. Wainwright, 372 U.S. 335 (1963), and Argersinger v. Hamlin, 407 U.S. 25 (1972). Several other decisions have removed financial barriers that faced indigents involved in the criminal process. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956) (right to state-supplied transcript on criminal appeal).

> to consider all the conceivable state justifications . . . . His invalidation for lack of an offered explanation conformed to the less deferential stance suggested by the model.[105]

This seems to indicate that the critical difference between *James*, or Gunther's view of *James*, and the old equal protection is the lack of inclination to supply a judicially hypothesized rationale, really a "less deferential stance." Since the *Boraas* majority went far beyond this standard in their questioning of the degree of means-end connection and their discussion of less onerous means, *James* does not settle the question of the authority for *Boraas*.[106]

The two cases principally relied upon by the *Boraas* majority were *Reed v. Reed*[107] and *Eisenstadt v. Baird*.[108] *Reed* held unconstitutional an Idaho probate provision that gave men a mandatory preference over women when persons of the same priority class applied for appointment to administer a decedent's estate. The statutory objective was probate simplification, an admittedly legitimate objective.[109] Using language quoted in both *Boraas* and *Baird*,[110] the Court stated:

> A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." . . . The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by [the statute].[111]

Eliminating a class of applicants for letters of adminstration would seem to simplify probate procedure, but the Court decided that "[t]o give a mandatory preference to members of either sex . . . is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . . ."[112]

The *Boraas* court read this language as requiring something more

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105. Gunther, *supra* note 25, at 33.

106. The *Boraas* court did comment that "[i]f some or all of these hypothesized objectives [such as rent control, use intensity, and traffic control] were supportable, some form of such ordinance might conceivably be upheld as a valid exercise of state police power. Upon the record before us, however, we fail to find a vestige of any such support." 476 F.2d at 816. Taken alone, this appears to be an example of the Gunther standard, under which a court will not be bound to theorize a permissible objective. But the *Boraas* court immediately began to discuss inadequate links between means and ends, thus making it quite unclear whether the element unsupported by the record was the hypothesized objective or the means-end link.

107. 404 U.S. 71 (1971).

108. 405 U.S. 438 (1972).

109. 404 U.S. at 76.

110. 405 U.S. at 447; 476 F.2d at 814-15.

111. 404 U.S. at 76, *quoting* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

112. 404 U.S. at 76.

stringent than a mere rational relationship between means and ends, in spite of *Reed*'s announced rational relationship requirement. Both the *Boraas* dissent and Professor Gunther thought that *Reed* reflected a special suspicion of sex classifications.[113] Rather than considering the *Reed* result as a manifestation of increased judicial scrutiny, however, it might be fruitful to focus on the Court's statement that the classification was "arbitrary." If the Idaho statute had given a mandatory preference to all persons under five feet, seven inches tall, the statutory objective of simplifying probate procedures would be advanced in the same way as by giving preferred status to men, for in either case a class of applicants would be eliminated. Yet a classification based on height would certainly be struck down as arbitrary. The key is that, not only must there be a rational means-end relationship, but also the intrinsic characteristic of the class must bear some relationship to the proposed statutory objective.[114] Thus, *Reed* can be read as focusing, in traditional equal protection fashion, on the second step of this two-step inquiry, the rational basis for the differing treatment of similarly situated groups.

However, the case can be read to support the heightened review found in *Boraas*. The Court in *Reed* took no notice of the argument, put forward in respondent's brief,[115] that men are likely to have more business experience than women and thus would make more suitable executors. The Court's failure to accept this argument might indicate that it still found no rational basis for the classification. But it is also possible that, since not every woman would have less business experience than every man, the relationship between the classification and the objective was not considered rational enough or, as worded in *Boraas*, substantial enough to pass constitutional muster. This ap-

113. 476 F.2d at 820 (Timbers, J.); Gunther, *supra* note 25, at 34. Justice Marshall, dissenting in *Rodriguez*, suggested that classifications based on factors, such as race or illegitimacy, that are totally beyond an individual's control should be considered inherently suspect. 411 U.S. at 108-09. *See* the discussion at text accompanying notes 119-22 *infra*.

114. *See Developments in the Law–Equal Protection, supra* note 13, at 1082-83. *See also* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) ("The inferior classification of illegitimates bears . . . no significant relationship to those recognized purposes of recovery [served by workmen's compensation statutes]."); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Gulf, C. & S. F. Ry. v. Ellis, 165 U.S. 150 (1897).

This approach also comports with the analysis of Professors Tussman and ten Broek, *supra* note 13, at 343-53. Their explication began with the proposition that "[a] reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law" and excludes all others. *Id.* at 346. The analysis of a legislative classification would thus involve the following steps: (1) identification of the purpose of the law; (2) determination of the ideal disadvantaged class—ideal in the sense that it contains all those similarly situated with respect to the purpose of the law, and no others; (3) comparison of the legislative classification with the ideal class; and (4) determination of the permissible degree of deviation from the ideal.

115. *See* Brief for Appellee at 12.

116. *See* text accompanying notes 40-42 *supra*.

proach would be quite similar to that taken in *Boraas*, where the court noted that not every nonrelated group caused additional traffic, noise, or rent-inflation.[116] This mode of reasoning, however, is not explicit in *Reed*,[117] and later cases indicate the Court might not be disposed to read *Reed* in this way.[118]

Four justices, in a subsequent case, read *Reed* as applying the strict scrutiny test. In *Frontiero v. Richardson*[119] the Court ruled on differing statutory treatment of men and women in the armed services who attempted to obtain increased quarters allowances and medical and dental benefits for themselves and their dependent spouses. Wives of uniformed men were presumed dependent, while husbands of uniformed women were not. The differing treatment was found unconstitutional, and four members of the Court, viewing *Reed* as a strict scrutiny opinion, held that classifications based on sex were inherently suspect and subject to strict judicial scrutiny.[120] The plurality felt that the respondent's argument in *Reed*—that men could legitimately be presumed to be better administrators than women because they had more business experience—was enough to satisfy the rational basis test. Since the Court had found a violation of the equal protection clause, the argument went, strict judicial scrutiny must have been tacitly applied.[121]

This assumption that an equal protection case must be decided under either the rational basis test or the strict scrutiny test involves a certain amount of judicial pushing-under-the-rug of awkward elements that do not easily fit into either tier. For instance, the *Frontiero* plurality did not mention the *Reed* Court's failure to address the inherent suspectness of sex classifications. If the case is not

117. Noteworthy in *Reed* is the Court's assumption of arbitrariness in the face of the ignored rational distinction between men and women—specifically, the greater business experience of men. A like assumption of similarity of situation occurred in *James*, where the Court assumed without discussion that indigent criminal defendants are not more prone to conceal assets than are civil debtors. *See* text following note 100 *supra*. Professor Gunther's, and *Boraas*'s, requirement that some factual demonstration be made might be lurking here, for the failure of the government to show grounds of distinction could explain the brusque assumption by each Court that the classifications were arbitrary.

118. A number of recent cases have also questioned whether the goal of administrative convenience should be afforded legitimate status in every case. These cases found constitutional violations even though the state could show some rational basis between the classification and the objective of administrative convenience. *See* Vlandis v. Kline, 412 U.S. 441 (1973); Frontiero v. Richardson, 411 U.S. 677 (1973); Stanley v. Illinois, 405 U.S. 645 (1972).

The lack of deference shown in *Reed* to the state's objective of facilitating probate administration could be explained by the Court's downgrading of this one particular objective. This approach would not be available in *Boraas*, where traditional zoning objectives were propounded.

119. 411 U.S. 677 (1973).

120. 411 U.S. at 688.

121. 411 U.S. at 682-84.

to be forced into a mold, it is at least arguable that *Reed* applied some sort of intermediate standard of review. The recognition of an emerging invidious classification could justify the heightened scrutiny.[122]

Although the *Frontiero* plurality interpreted *Reed* as a compelling interest case, this does not alter the fact that the Court in *Reed* was willing to employ a review stronger than the rational relationship standard, yet was not willing to employ strict judicial scrutiny. Therefore, *Reed* arguably applies a form of intermediate review and lends support to *Boraas*.

At issue in *Eisenstadt v. Baird*[123] was a Massachusetts statute that made it a crime for anyone to dispense contraceptives to unmarried persons. Physicians and pharmacists were permitted to dispense contraceptives to married persons, and the statute had been construed to permit anyone to dispense contraceptives to married or unmarried persons for the purpose of preventing disease. The Court found the statute unconstitutional.[124] The majority opinion allegedly used minimal scrutiny and posited the test in these terms: " 'The Equal Protection Clause . . . den[ies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.' "[125] The Court then described the issue as "whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons under [the statute]."[126]

The first goal considered by the Court was the discouragement of premarital sexual activity. The majority found that the statute had "at best a marginal relation" to this objective because it allowed unmarried people to obtain contraceptives if they were used to prevent disease. Also, married persons could obtain contraceptives to engage in sexual activity with unmarried persons. The slight effect on premarital sexual activity plus the fact that fornication was already a misdemeanor led the Court to conclude that deterrence of premarital sex was not the statutory objective.[127]

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122. *Weber* also arguably fits this pattern, for illegitimacy appears to have been held to be a suspect classification in Gomez v. Perez, 409 U.S. 535 (1973) (per curiam).

123. 405 U.S. 438 (1972). The case is discussed in Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 124-28 (1972).

124. There were a variety of opinions explaining the result. Justice Brennan's majority opinion, which voided the statute on equal protection grounds, drew the support of Justices Douglas, Marshall, and Stewart. Justice Douglas also wrote a concurring opinion based on the first amendment, and Justices White and Blackmun concurred on the ground that the statute impinged on the fundamental right of marital privacy without an adequate state interest being shown. Chief Justice Burger dissented, and Justices Powell and Rehnquist did not participate.

125. 405 U.S. at 447, *quoting* Reed, 404 U.S. at 75-76.

126. 405 U.S. at 447.

127. 405 U.S. at 450.

The majority opinion then rejected a second possible purpose, the state's desire to regulate the distribution of potentially dangerous drugs and devices. The opinion questioned the danger presented by the use of certain contraceptives[128] but found that, even assuming that contraceptives were dangerous enough to require a physician's prescription, the need for such a requirement was equally great for married and unmarried persons.[129] The exclusion of unmarried persons from the benefits of a physician's help in obtaining contraceptives, the majority's lack of belief that the "legislature suddenly reversed its field and developed an interest in health" after having a different purpose for similar prior legislation,[130] and the fact that existing federal and state legislation regulated the distribution of harmful drugs[131] led the Court to the conclusion that the regulation of potentially harmful drugs was not the object of the statute.[132]

The Court then considered its own theory as to the purpose of the legislation:[133] an outright ban on the use of contraceptives to the extent permitted by *Griswold v. Connecticut*.[134] Under *Griswold* a ban on giving contraceptives to married persons is impermissible. *Baird* stated that if the state attempted to provide that married persons could receive contraceptives and unmarried persons could not, "[i]n each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious."[135] Thus, the Court found that the legislation could have been passed to further this impermis-

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128. 405 U.S. at 451 n.9. In his concurring opinion, Justice White, while finding that the state's purported objective of limiting the channels of distribution of potentially dangerous commodities was entirely legitimate, voted to reverse the conviction because there was no evidence in the record that the particular contraceptive in question, a packet of vaginal foam, was dangerous, 405 U.S. at 464.

Justice White admitted a "general reluctance to question a State's judgment on matters of public health," 405 U.S. at 463, but went on: "Due regard for protecting constitutional rights requires that the record contain evidence that a restriction on distribution of vaginal foam is essential to achieve the statutory purpose . . . ." 405 U.S. at 464. The constitutional right involved was the right of marital privacy found in Griswold v. Connecticut, 381 U.S. 479 (1965). Justice White believed that the *Griswold* right was relevant to the present case because the offense prohibited by the statute was distribution of contraceptives by an unlicensed person to either married or unmarried persons. 405 U.S. at 462. Since the prohibition on the distribution of harmless contraceptives to married persons violated *Griswold*, and the record contained no evidence to show whether the recipient in *Baird* was married or unmarried, the factual inquiry into the potential harmfulness of the distributed contraceptive was warranted so that a constitutional right would not be unduly burdened. Thus, Justice White applied the strict scrutiny test to reach the same result as the majority.

129. 405 U.S. at 450.

130. 405 U.S. at 450, *citing* Baird v. Eisenstadt, 429 F.2d 1398, 1401 (1st Cir. 1970).

131. 405 U.S. at 452.

132. 405 U.S. at 452.

133. 405 U.S. at 452-54.

134. 381 U.S. 479 (1965).

135. 405 U.S. at 454.

sible objective, but that if this were the objective the law would violate the equal protection clause.

The opinion contains some elements of the *Boraas* version of the new equal protection test;[136] little, if any, deference is paid to the avowed legislative objective, and the level of review is certainly greater than under the minimal scrutiny standard. But the scrutiny in *Baird* is largely directed at the legislative objective, not at the means of achieving it. Two explicit objectives are rejected, and the Court found an imputed objective impermissible, an approach at variance with the Gunther equal protection, which theoretically considers only those objectives on the record before the court. This intense examination of legislative objectives and searching for unstated legislative purposes is a salient characteristic of the strict scrutiny approach.[137] It is true that no fundamental interest was said to be at stake in *Baird,* but much of the tortuous analysis in the majority opinion seems to be an attempt to avoid deciding the case on *Griswold* grounds.[138] Moreover, the Court's finding of no rational relationship[139] is also open to criticism, since parts of the statute were arguably related (the Court agreed that at least a "marginal relation" existed[140]) to the two objectives suggested by the state.[141] Thus, while the degree of review in *Baird* is quite intense, the review conforms inexactly with both *Boraas* and Gunther in that the main thrust of the opinion is directed toward uncovering the actual purpose of the Massachusetts legislature, rather than toward determining if the different treatment of married and unmarried persons is in fact related to a valid public purpose.[142]

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136. The unwillingness to allow a permissible distinction between married and unmarried people may bear tangentially on whether a municipality can affirmatively favor a family group in its zoning legislation. *But see* note 36 *supra.*

137. *See* Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972); Griffin v. County School Bd., 377 U.S. 218, 231 (1964).

138. In dicta the majority pointed the way to an extension of *Griswold*:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

405 U.S. at 453 (emphasis original). *See* 405 U.S. at 447 n.7.

139. 405 U.S. at 454-55.

140. 405 U.S. at 448.

141. The Court's procedure has been characterized as a "divide and conquer" analytic technique. If the Court had not separated legislative goals, but had considered an over-all legislative goal encompassing both of the objectives considered by the Court, the finding that there was no rational relationship between the goals and and the statute would have been much more difficult to make. Note, *supra* note 123, at 124-28.

142. If the *Baird* technique had been applied in *Boraas,* the court would have rejected various statutory objectives as not credible because the blood-related classification was not closely enough related to the suggested objective or because laws already

It is also possible to view *Baird* as supporting some type of middle-ground equal protection review. It could be argued that when there is an emerging fundamental right under adjudication—a right that the Court is unwilling at this point to designate as fundamental but that has the characteristics of previously recognized fundamental rights—the Court will begin stretching the rational basis test. In *Baird,* this right would be the possible extension of the *Griswold* rights of marital privacy and association to protect unmarried individuals. Following this idea, it could be argued that the *Baird* Court, faced with a right of possible constitutional proportions but unwilling to recognize it as such by overtly applying the compelling interest test, paid less heed to conceivable rational relationships than is customary under the minimal scrutiny standard. The Court's examination of legislative objectives, at least to the extent of trying to determine the actual objective of the legislation, and its refusal to defer to the normally sacrosanct legislative goal of public health[143] are both techniques foreign to minimal scrutiny.

The opinion also mirrored *Reed* and *James* in ignoring conceivable grounds for distinguishing between seemingly similarly situated groups. The Court stated that denial of contraceptive distribution to unmarried persons in order to salvage so much of the state's morality code as *Griswold* would allow would violate the equal protection clause because "[i]n each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious."[144] In other words, the Court assumed that no fair ground of distinction between married and unmarried persons was possible here. As will be discussed,[145] this failure to discuss possible justifications runs through

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existed to accomplish the same purposes. Then it would have formulated its own notion as to the village's objective—for instance, a desire to keep college students out of the community. Such an objective would not advance any legitimate police power purpose and so would violate the equal protection clause. Of course, this analysis was not adopted in *Boraas.* Indeed, the court suggested legislation that could be passed to accomplish the same zoning objectives, a reverse of the *Baird* approach.

The *Baird* approach does not take into account a line of cases dating back to Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 129, 131 (1810), in which the Supreme Court has maintained that a statute cannot be invalidated merely because the legislature's action was motivated by impermissible considerations. An exception has been found in cases involving unstated racially discriminatory objectives. *See, e.g.,* Griffin v. County School Bd., 377 U.S. 218, 231 (1964); Gomillion v. Lightfoot, 364 U.S. 339, 346-47 (1960). *But see* Palmer v. Thompson, 403 U.S. 217, 224-25 (1971).

Some very able commentators have suggested, however, that courts have carried their refusal to examine official purposes to an undesirable extreme. *See* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive,* 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law,* 79 YALE L.J. 1205 (1970).

143. *See* Jacobson v. Massachusetts, 197 U.S. 11 (1905).

144. 405 U.S. at 454.

145. *See* text accompanying notes 157-61 *infra.*

the precedents cited by the *Boraas* court, and may well form the basis for an intermediate standard of equal protection review.

C. *Observations on the Cases Cited in Boraas*

It is difficult to generalize about the group of cases cited as precedent in *Boraas*. The cases do not forthrightly enunciate any doctrinal shift. Even assuming some emerging new standard, the most obvious feature shared by the cases is the Court's willingness to use the equal protection clause as a vehicle for avoiding more controversial rationales.[146] As a result, the minimal scrutiny test has been applied with a bit more bite and with a less quiescent attitude toward legislative goals. It should be noted, however, that the Court gave no indication of when it would employ this heightened scrutiny,[147] and in other cases from the same term it retained the traditional two-tier approach.[148]

Viewed less charitably, the cases can be taken to show that no new test exists at all. *Jackson*,[149] *Humphrey*,[150] and *James*[151] only extended past rational-basis precedents. *Mosley*[152] and *Baird*[153] can be read as involving fundamental interests, which justify strict judicial

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146. *See* note 57 *supra*.

147. Neither the *Boraas* court nor Professor Gunther really come to grips with this problem. The *Boraas* majority briefly suggests, "This approach is particularly appropriate in cases of the present type, where individual human rights of groups as opposed to business regulations are involved," 476 F.2d at 815, but neglects to say why the standard was not employed in cases such as Dandridge v. Williams, 397 U.S. 471 (1970) (welfare), or Lindsey v. Normet, 405 U.S. 56 (1972) (housing), where individual rights to welfare and housing benefits were at stake.

Professor Gunther suggests that the use of his model would be limited only by considerations of "judicial competence," rather than on the basis of "a priori categorizations of the 'social and economic' variety." Gunther, *supra* note 25, at 23. He assumes that there is judicial competence to determine "the rationality of means used in solving *many* 'economic and social' problems," *id.* at 24 (emphasis added), but not to solve problems that are "exceedingly technical and complex" or problems in response to which the legislature can legitimately adopt several approaches. *Id.* Gunther, however, does not consider the difficulty of dealing with an ad hoc standard, the application of which would be rendered even more uncertain by the level of "competence" of whoever happened to be on the court at the time. In addition it does not appear that the courts are limiting the new standard in such a way. The Second Circuit, in Aguayo v. Richardson, 473 F.2d 1090, 1109 (1973), *cert. denied*, 42 U.S.L.W. 3406 (U.S., Jan. 14, 1974), cited the new approach in an opinion remanding a particularly complex case.

148. Minimal scrutiny was employed in Jefferson v. Hackney, 406 U.S. 535 (1972); Lindsey v. Normet, 405 U.S. 56 (1972); Schill v. Knebel, 404 U.S. 357 (1971); and Richardson v. Belcher, 404 U.S. 78 (1971). *See also* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973); McGinnis v. Royster, 410 U.S. 263 (1973); and United States v. Kras, 409 U.S. 434 (1973).

149. *See* text accompanying notes 62-68 *supra*.

150. *See* text accompanying notes 69-71 *supra*.

151. *See* text accompanying notes 94-106 *supra*.

152. *See* text accompanying notes 72-82 *supra*.

153. *See* text accompanying notes 123-44 *supra*.

review. *Reed*[154] and *Weber*[155] can be interpreted as involving suspect classifications, and *Reed* can also be read as an orthodox striking-down of an arbitrary classification.

This group of Supreme Court cases, however, can also be seen as pointing toward a middle-ground test of equal protection, a test requiring more than a conceivable rational relationship. As noted previously,[156] equal protection analysis always involves a dual inquiry: Not only must the means be rationally related to the ends, but the intrinsic nature of the class must bear some relationship to the statutory objective, so that similarly situated groups are not treated differently. It is suggested that it is in this second area that the Court is applying heightened judicial scrutiny.

In *Jackson* the Court's inquiry centered on whether the especially severe commitment procedures for mentally defective criminal defendants could be distinguished from commitment procedures for all other individuals. Looking to the record, the Court concluded that grounds for the distinction did not exist.

The analysis in *Humphrey* focused on possible grounds for different commitment procedures for sex offenders. Rather than hypothesize a basis for the differing treatment, the Court remanded the case for an evidentiary hearing to determine, among other things, if there was any special characteristic of sex offenders that would make a jury trial inappropriate. Of course, the requirement of a concrete demonstration fits Professor Gunther's proposed test, but Gunther suggested a showing of a factual tie between means and ends. *Humphrey* may require some sort of showing for the more limited purpose of determining if adequate grounds for distinction between ostensibly similarly situated groups exist.

Reed, James, and *Baird* exhibit the same analysis in even more striking fashion. In *Reed,* not only did the sex classification have to facilitate probate procedure, but the intrinsic characteristic of the class, sex, had to be shown to bear some relationship to expedited administration. The Court summarily concluded it did not. Possible arguments of conceivable rationality that might have been presented to explain the differing classification—for example, that men might have more business experience—were not even discussed. Similarly, in *James* the Court appeared to presume that indigent criminal defendants could not be distinguished from civil debtors for the purpose of denying certain exemptions from creditor process. The Court did not consider the possible argument that indigent criminal defendants would be more likely to conceal assets than civil debtors. And in *Baird,* although most of the opinion dealt with the consideration

154. *See* text accompanying notes 107-22 *supra.*

155. *See* text accompanying notes 83-93 *supra.*

156. *See* text accompanying note 114 *supra.*

and rejection of purported legislative goals, in the closing portion of the opinion the Court stated without discussion that married and unmarried persons were indistinguishable for the purpose of contraceptive distribution. Again, the similarity of situation was presumed.

Humphrey, James, Reed, and to a lesser extent, *Baird, Weber, Mosley,*[157] and *Jackson,* all suggest a heightened level of judicial review, with the focus on grounds of distinction between classes.[158] The level of scrutiny is uncertain, as most of the cases presumed the classes to be indistinguishable, but the cases may be read as requiring at least something more than conceivably rational grounds of distinction where the posited grounds are not applicable in every case.[159]

The basis for the intensified review is not completely clear. Three of the cases, *Reed, Weber,* and *Baird,* involved what might be termed emerging fundamental rights or emerging suspect classifications. *Jackson* and *Humphrey* could arguably fit this pattern, as both cases concerned discriminatory commitment procedures of mentally disturbed or retarded individuals, a class that could trouble the Court because it possesses many of the indicia of a suspect class.[160] *Mosley* and *James* involved fringe areas of already recognized rights—specifically, first amendment rights and the right of an indigent criminal to assistance of counsel. In this regard *Boraas* seems a suitable case for the application of a more stringent review, as it raises issues on the fringe area of the recognized right of association.[161]

Applied to *Boraas,* this analysis would have the court focus on the reasons for the different treatment accorded to related and nonrelated

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157. *Mosley* did focus on the grounds for distinction between labor and all other forms of picketing. However, the degree of review is easily explained by the presence of first amendment rights in the case. *See* text accompanying note 73 *supra.*

158. It is not suggested that scrutiny of the grounds of distinction between groups is an altogether new phenomenon. As Chief Justice Burger's quotation in *Reed* from F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1919), makes clear, such concern has existed for many years: "[A classification] must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike." 404 U.S. at 76. *See also* Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring): "The framers of the Constitution knew . . . that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation . . . ." Noteworthy in the recent cases is the virtual assumption, demonstrated by the summary refusal to consider justifying arguments, that there are no grounds for distinction. This analytic technique is, by and large, unique to the recent Supreme Court cases.

159. For instance, *Reed* could be interpreted as saying that, because not every woman has less business experience than every man, this ground of distinction is not rational enough to satisfy the equal protection clause.

160. *See* Comment, *Segregation of Poor and Minority Children into Classes for the Mentally Retarded by the Use of IQ Tests,* 71 MICH. L. REV. 1212, 1236 (1973).

161. *See* authorities cited in note 20 *supra.*

groups, rather than on the means-end connection.[162] The inquiry would center, not on possible traffic, noise, and congestion problems caused by nonrelated groups, but on whether nonrelated groups cause these assorted problems to a greater extent than do traditional families. Although the *Boraas* court was avowedly searching only for a means-end connection, it does appear that, when applying its test, it was actually focusing on the reasons for the distinction between the classes.[163] At one point the court appears to ask for a factual showing justifying the differing treatment.[164] The court also approached the problem on a more generalized plane when, quoting *Trottner*, it theorized that not every nonrelated group differs from traditional families in the amount of noise, traffic, and congestion caused.[165] The fact that the classes were found to be identical in the relevant aspects, apparently because the distinction was not valid for every, or at least most, nonfamily groups, appears to indicate that the court, like the cases it cites, was looking for more than a rational grounds of distinction. Although the lack of a distinction was not presumed in *Boraas* as it was in *Reed*, *James*, or *Baird*, the court's analysis seems comparable to that of the Supreme Court in those cases. Nevertheless, even accepting the interpretation of *Boraas* most consistent with the Supreme Court precedents, there is no explanation for why the *Boraas* court felt constrained to drag the less onerous means analysis into its opinion. It is thus unclear whether the lack of a demonstration of a basis of distinction between the classes was a ground of decision, and it is also uncertain what significance the court attached to the technique for which the precedents seem to stand.

In summary, while an expansive reading of the recent Supreme Court cases indicates that some sort of middle-ground review may be undertaken on occasion, the degree of additional scrutiny that may be undertaken and the situations in which middle-ground review is applicable are unclear. *Boraas* exhibits some characteristics of this postulated middle-ground approach but also strikes out into completely new territory.

III. The *Rodriguez* Opinion

Boraas was decided on February 27, 1973. On March 21, 1973, the Supreme Court handed down its decision in *San Antonio Indepen-*

162. If, as in *Humphrey*, *see* text accompanying note 70 *supra*, the court wished to make a factual determination of the issues, different results could occur in different communities, for certain municipalities might be able to show additional burdens on facilities due to occupancy of nonrelated persons, while others might not.

163. The court may have engaged in some means-end scrutiny in the section of the opinion following the citation of Kirsch Holding Co. v. Manasquan, 59 N.J. 241, 281 A.2d 513 (1971). *See* 476 F.2d at 817. That case found a similar zoning ordinance invalid under a due process theory that stressed the lack of a means-end connection. *See* note 47 *supra* and text accompanying notes 237-41 *infra*.

164. *See* text accompanying note 40 *supra*.

165. *See* text accompanying notes 41-42 *supra*.

dent School District v. Rodriguez.[166] The *Rodriguez* majority emphatically opted for the traditional two-tier equal protection approach, ignored the possibility of a new emergent standard, and read some of the cases relied on by the *Boraas* court in such a way as to negate any precedential value they might have had as harbingers of a new equal protection.

Rodriguez involved a class action filed on behalf of certain Texas school children challenging the constitutionality of the state's statutory system of financing public education under the equal protection clause. The system authorized an ad valorem tax by each school district on property within the district to supplement educational funds received from the state. This resulted in substantial interdistrict disparities in per-pupil expenditures; the disparities were chiefly attributable to the fact that differing amounts were received through local property taxation because of variations in the amount of taxable property within each district. A three-judge district court had held that the system discriminated on the basis of wealth and was thus unconstitutional; it found that wealth was a suspect classification and that education was a fundamental interest. In the alternative, the court ruled that the state had failed to meet even the minimal scrutiny test.[167] The Supreme Court, in a five-four decision, reversed.

At the outset of the opinion, the Court described its framework for analysis:

> We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny . . . . If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.[168]

The Court thus clearly opts for two-tier equal protection. The middle ground proposed in *Boraas* played no part in the Court's analytic framework,[169] and the remainder of the opinion confirms the express adoption of a two-level analysis.

166. 411 U.S. 1 (1973).

167. Rodriguez v. San Antonio Independent School Dist., 337 F. Supp. 280 (1971).

168. 411 U.S. at 17.

169. The Court did require a rational relation to a "legitimate, articulated state purpose," a slight change over the traditional minimal scrutiny test, which deferred to legislative enactments to the extent of hypothesizing justifying purposes. The change to a requirement of an articulated rationale conforms to Professor Gunther's model and also to the *Boraas* dissent's reading of recent Supreme Court opinions. However, this slight change of judicial attitude would not affect the analysis of the *Boraas* majority, which had articulated state objectives on the record before it. The Supreme Court cited no authority for the requirement of an articulated purpose. At later points in the opinion, the Court stated the test in absolutely orthodox form. *E.g.*, 411 U.S. at 55. The Court's decision in *Boraas* also made no mention of a new standard. 42 U.S.L.W. at 4477.

The Court first determined that no suspect classification was involved in the case. While not ruling directly on the issue of whether classifications based on a lack of wealth are inherently invidious, the Court noted that this was not a case where a classification involving wealth entailed absolute denial of a benefit, pointed out that no clear-cut class of the poor was being discriminated against, and rejected the broad notion that a classification that creates a class composed solely of persons living in a district with less taxable wealth could be deemed to be inherently suspect.[170]

The Court then found that education was not a fundamental right. To arrive at this conclusion, the Court posited a standard for determining if a right is fundamental: "[T]he key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."[171] Cited as authority for this proposition, *inter alia*, were *Mosley* and *Baird*.[172] In a footnote, the Court described *Mosley* as "[striking] down a Chicago antipicketing ordinance that exempted labor picketing from its prohibitions. The ordinance was held invalid under the Equal Protection Clause after subjecting it to careful scrutiny and finding that the ordinance was not narrowly drawn. The stricter standard of review was appropriately applied since the ordinance was one 'affecting First Amendment interests.' "[173] Justice Marshall, in dissent, also interpreted *Mosley* as a case calling for strict judicial scrutiny due to the presence of questions involving the guaranteed right of freedom of speech.[174] *Mosley* thus can no longer be cited as authority for the standard articulated in *Boraas*.

The *Rodriguez* Court also hinted that *Baird* could be viewed as a strict scrutiny case. The majority said in a footnote that

> [i]n *Eisenstadt* [*v. Baird*] the Court struck down a Massachusetts statute that prohibited the distribution of contraceptive devices, finding that the law failed "to satisfy even the more lenient equal protection standard." . . . Nevertheless, in *dictum*, the Court recited the correct form of equal protection analysis: "[I]f we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under *Griswold* . . . , the statutory classification would have to be not merely *rationally related* to a valid public purpose but *necessary* to the achievement of a *compelling* state interest."[175]

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170. 411 U.S. at 25, 28.

171. 411 U.S. at 33-34.

172. 411 U.S. at 34.

173. 411 U.S. at 34 n.75, *quoting* 408 U.S. at 101.

174. 411 U.S. at 99.

175. 411 U.S. at 34 n.73, *quoting* 405 U.S. at 447 n.7 (emphasis original).

It is possible to interpret this cryptic footnote as implying that *Baird* is a strict scrutiny case because a right implicitly recognized in the Constitution, the right of marital privacy, was impinged upon. Justice Marshall, in dissent, interpreted the case in this way.[176] In any case, the fact that the Court described the *Baird* holding as "finding that the law failed 'to satisfy even the more lenient equal protection standard' " and did not mention the intense level of review and lack of tolerance to stated legislative purposes that characterized that opinion's analytic technique fits the case into the traditional two-level approach. Again, any precedential value as support for the *Boraas* opinion is significantly weakened.

The Court, after finding that education was not explicitly or implicitly guaranteed by the Constitution,[177] went on to analyze the Texas legislative scheme under the traditional standard of review. Again, there was not even a hint of an intermediate standard. And, in applying the rational relationship standard, the Court not only did not carefully scrutinize the relationship of the means to the state purpose, but showed a great degree of tolerance and noted that "[t]he very complexity of the problems of financing and managing a statewide public school system suggests that 'there will be more than one constitutionally permissible method of solving them.' . . ."[178] Ultimately, the Court found the state's financing system to be rationally related to the legitimate purpose of encouraging local participation in and control of each district's schools.[179]

The relationship of means to ends was attacked by appellees in a manner suggestive of the *Boraas* approach: "Appellees do not question the propriety of Texas' dedication to local control of education. To the contrary, they attack the school-financing system precisely because . . . it does not provide the same level of local control and fiscal flexibility in all districts. Appellees suggest that local control could be preserved and promoted under other financing systems that resulted in more equality in educational expenditures."[180] In other words, they argued that no rational relationship existed because there were other financing systems that could raise revenue and encourage local

176. 411 U.S. at 103-04. *See also* 42 U.S.L.W. at 4477.

177. The Court was faced with, and rejected, the argument that education should be considered a fundamental right because it was necessary if a person's right to free speech and right to vote were to be exercised in a meaningful manner. The Court thought that the argument would be equally applicable in the areas of welfare and housing and thus would be at odds with past decisions. 411 U.S. at 37. It also noted that "we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice." 411 U.S. at 36 (emphasis original). Justice Brennan, in dissent, accepted the argument that there was a nexus between education and first amendment rights and therefore would have classified education as a fundamental right. 411 U.S. at 63.

178. 411 U.S. at 42, *quoting* Jefferson v. Hackney, 406 U.S. 535, 546-47 (1972).

179. 411 U.S. at 55.

180. 411 U.S. at 50.

control without creating the same disparity in per-pupil expenditures. This argument is very similar to the two arguments accepted by the *Boraas* court: that nonrelated groups do not always have an adverse effect on, for example, rent values and land use intensity; and that the same goals could be achieved by less restrictive means.

The *Rodriguez* Court's response to this less onerous means argument casts the *Boraas* analysis into grave doubt: "While it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others, the existence of 'some inequality' in the manner in which the State's rationale is achieved is not alone a sufficient basis for striking down the entire system."[181] Applying the same analysis to *Boraas*, the fact that not every nonconsanguineous group has a deleterious effect on legitimate zoning objectives would not render the system unconstitutional, for it would indicate only the "existence of 'some inequality' in the manner in which the State's rationale is achieved."[182] The *Rodriguez* Court continued: "Nor must the financing system fail because, as appellees suggest, other methods of satisfying the State's interest, which occasion 'less drastic' disparities in expenditures, might be conceived. Only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative."[183] Although the *Boraas* court explicitly rejected application of strict scrutiny at the outset of the opinion, it adopted a test that, as *Rodriguez* makes clear, is only applicable in fundamental rights cases.

On the other hand, the *Rodriguez* opinion does contain more discussion of rationality than do earlier minimal scrutiny opinions. The entire Texas funding scheme is set out in detail at the outset of the opinion,[184] and there is some discussion of the actual operation of the system.[185] In reaching its conclusion, however, the Court accepted quite docilely the state's argument that the scheme furthered the goal of encouraging local participation and control while ensuring a basic education. The Court, after simply quoting the statutes involved, agreed that the system rationally supported the state goal:

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181. 411 U.S. at 50-51, *citing* McGowan v. Maryland, 366 U.S. 420 (1961); Dandridge v. Williams, 397 U.S. 471 (1970). A month later, in Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973), the Court sustained the imposition on all members of a defined class of an allegedly "imprecise" rule promulgated pursuant to the Truth in Lending Act because it served to discourage evasion by a substantial portion of that class of disclosure mechanisms required by Congress for consumer protection. This case bears on any overinclusion argument that could be made when attacking a *Boraas*-type of zoning ordinance. *See* text accompanying notes 236-43 *infra*.

182. *Rodriguez*, however, did involve an extremely complex problem, so the Court may have been more tolerant of inexact classifications than it would be upon review of the relatively simple ordinance involved in *Boraas*.

183. 411 U.S. at 51.

184. 411 U.S. at 6-14.

185. 411 U.S. at 13-14, 15 nn. 38 & 46.

> While it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others, . . . [i]t is . . . well to remember that even those districts that have reduced ability to make free decisions with respect to how much they spend on education still retain under the present system a large measure of authority as to how available funds will be allocated.[186]

After noting that the existence of some inequality can never be the basis for striking down an entire system, the Court, in traditional fashion, presumed the system valid: "[I]t is rooted in decades of experience in Texas and elsewhere, and in major part is the product of responsible studies by qualified people. In giving substance to the presumption of validity to which the Texas system is entitled . . . it is important to remember that at every stage of its development it has constituted a 'rough accommodation' of interests in an effort to arrive at practical and workable solutions."[187]

Thus, the Court, by and large, deferred to the state's position, a far cry from requiring the factual showing that the *Boraas* court found necessary. The detailed description in *Rodriguez* of the Texas plan could have been included in response to the four dissenters,[188] who all questioned the system's rationality. The majority was also faced with an adverse decision below, a state court decision invalidating a similar financing plan,[189] and an unusual amount of public and scholarly controversy and interest.[190] It is more likely that these factors induced the Court's long description of the Texas scheme than that the Court was, without comment, requiring some sort of showing of a heightened rationality before validating the financing plan.

Justice Stewart, in a concurring opinion, reiterated the majority's approach: "I join the opinion and judgment of the Court because I am convinced that any other course would mark an extraordinary departure from principled adjudication under the Equal Protection Clause . . . ."[191] Noting that the clause is offended only by laws that make "wholly arbitrary or capricious" classifications,[192] he went on to state that this doctrine exemplifies "one of the first principles of con-

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186. 411 U.S. at 50-51.

187. 411 U.S. at 55.

188. *See* 411 U.S. at 50 n.107, 51-52 n.108.

189. Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

190. *See, e.g.*, J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970); Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and its Progeny*, 120 U. PA. L. REV. 504 (1972); Comment, *Educational Financing, Equal Protection of the Laws, and the Supreme Court*, 70 MICH. L. REV. 1324 (1972); Moynihan, *Can Courts and Money Do It?*, N.Y. Times, Jan. 10, 1972, § E, at 1, col. 3 (late city ed.).

191. 411 U.S. at 59.

192. 411 U.S. at 60, *citing* Rinaldi v. Yeager, 384 U.S. 305 (1966), which was the chief precedent for *James*. *See* 407 U.S. at 140-41; text accompanying notes 97-101 *supra*.

stitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law."[193] This presumption only disappears when a classification is based on suspect criteria[194] or "impinges on a substantive right or liberty created or conferred by the Constitution."[195] He concluded by agreeing with the Court that the classifications before the Court did not rest "on grounds wholly irrelevant to the achievement of the State's objective."[196]

Justice Stewart's emphasis on a presumption of legislative validity differs strongly from Professor Gunther's model, which emphasizes a less deferential attitude to legislative enactments in order to verify the reality of means-end connection. Justice Stewart's re-emphasis of the majority's "wholly irrelevant" language also clashes markedly with both Gunther's model and the *Boraas* majority's averred requirement of "substantial means-ends relationship."[197]

After *Rodriguez,* virtually nothing remains of a doctrinal base for the *Boraas* opinion. While an intermediate standard is not explicitly rejected,[198] the Court restates orthodox two-tier equal protection formulations and makes no mention of any third test. The Court's application of the rational relationship test is noteworthy in its tolerance of classifications admittedly creating "some inequal-

193. 411 U.S. at 60.

194. 411 U.S. at 61, *citing, inter alia,* Weber v. Aetna Cas. & Sur. Co., discussed in text accompanying notes 83-93 *supra.*

195. 411 U.S. at 61, *citing, inter alia,* Police Dept. v. Mosley, discussed in text accompanying notes 72-82 *supra.*

196. 411 U.S. at 62.

197. Justice Marshall wrote a long and compelling dissent, joined by Justice Douglas. Justice Marshall excoriated the "rigidified approach to equal protection analysis" adopted by the majority, 411 U.S. at 99, and advocated instead a sliding-scale approach: "We must consider the substantiality of the state interests sought to be served, and we must scrutinize the reasonableness of the means by which the State has sought to advance its interests." 411 U.S. at 124. "'[C]oncentration [is] placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.'" 411 U.S. at 99, *quoting* Dandridge v. Williams, 397 U.S. 471, 520-21 (1970). *See also* Richardson v. Belcher, 404 U.S. 78, 90 (1971) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting). In his *Rodriguez* dissent, Justice Marshall read *Baird, Reed, James,* and *Weber* as supporting the sliding-scale approach. *See* 411 U.S. at 103-10.

Justice White now appears to support the position advocated by Justice Marshall. *See* Vlandis v. Kline, 412 U.S. 441, 458-59 (1973) (White, J., concurring).

The obvious drawback to a flexible, ad hoc balancing approach based on a judicial determination of the relative importance of the various rights and interests involved is the resemblance that this bears to the discredited, *see* Ferguson v. Skrupa, 372 U.S. 726 (1963), fundamental rights due process test. *See* Vlandis v. Kline, 412 U.S. 441, 459-63 (1973) (Burger, C.J., dissenting); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 179-80 (1972) (Rehnquist, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 484-85 (1970) (Stewart, J.); Levy v. Louisiana, 391 U.S. 68, 76-82 (1968) (Harlan, J., dissenting).

198. Justice Stewart did refer to the sliding-scale approach advocated by Justice Marshall as taking "uncharted directions" and as a "departure from principled adjudication under the Equal Protection Clause." 411 U.S. at 59.

ity."[199] Of the *Boraas* precedents, *Baird*,[200] *Weber*,[201] and *Mosley*[202] were read in *Rodriguez* as cases requiring strict scrutiny. *James*[203] had been cited by the Court in a previous opinion as lead authority for the application of the minimal scrutiny test,[204] and *Reed*[205] has been interpreted as involving a suspect class.[206]

199. Justice Stewart characterized the Texas financing plan as "chaotic and unjust." 411 U.S. at 59.

200. *See* text accompanying notes 123-44 *supra*.

201. *See* text accompanying notes 83-93 *supra*.

202. *See* text accompanying notes 72-82 *supra*.

203. *See* text accompanying notes 94-106 *supra*.

204. *See* McGinnis v. Royster, 410 U.S. 263, 270 (1973).

205. *See* text accompanying notes 107-22 *supra*.

206. *See* Frontiero v. Richardson, 411 U.S. 677, 682 (1973). *Reed* might also be viewed as an example of an unconstitutionally irrebuttable presumption. In Vlandis v. Kline, 412 U.S. 441 (1973), the Court struck down, as violative of the due process clause, portions of a Connecticut statute that categorized students at state colleges as residents and nonresidents of the state for the purpose of assessing tuition. The statutory definitions created a "permanent and irrebuttable presumption" of nonresidency for a student's entire sojourn at the university if the student's legal address at the time of admission was outside of Connecticut. No change in status was permitted, even if the student had actually become a state resident. The Court held that, "since Connecticut purports to be concerned with residency in allocating the rates for tuition and fees at its university system, it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination." 412 U.S. at 452. The Court later emphasized that the essential due process violation lay in providing no opportunity to challenge the presumption. 412 U.S. at 453. The Court's discussion closely tracked equal protection analysis, as various state justifying rationales were considered and rejected, the means-end connection being considered either unrelated, or purely arbitrary. *See* 412 U.S. at 448-52.

The "irrebuttable presumption" approach was again employed in the Court's recent decision in Cleveland Bd. of Educ. v. LaFleur, 42 U.S.L.W. 4186 (U.S., Jan. 21, 1974), which found mandatory statutory maternity leave regulations violative of the due process clause as unduly impinging upon the fundamental right to bear children. 42 U.S.L.W. at 4191. Limitations upon a teacher's eligibility to return to work after giving birth were similarly struck down. 42 U.S.L.W. at 4192. One of the objectives put forward by the state was the necessity of keeping physically unfit teachers out of the classroom. While admitting that some teachers might become physically disabled after the fifth-month cut-off date (the date of enforced leave), the Court stated that the rules swept "too broadly" and that, in the absence of an "individualized determination by the teacher's doctor—or the school board's—as to any particular teacher's ability to continue at her job," the provisions "'contain an irrebuttable presumption of physical incompetency." 42 U.S.L.W. at 4190. The Court noted that the record indicated that "each pregnancy was an individual matter, and should be prescribed for as such." 42 U.S.L.W. at 4190 n.12. The Court then suggested less onerous means of effectuating the same goal, 42 U.S.L.W. at 4191 n.14, and concluded that the rules "cannot pass muster under the Due Process Clause of the Fourteenth Amendment because they employ irrebuttable presumptions." 42 U.S.L.W. at 4191.

This analysis is very similar to that employed in *Boraas*, in spite of the difference in the ultimate ground of decision. It should be noted that *LaFleur* also quoted approvingly from *Green v. Waterford Bd. of Educ.*, 473 F.2d 629 (1973), a Second Circuit opinion involving similar facts decided under the equal protection test applied in *Boraas*. *Boraas*, however, does not involve a legislatively explicit presumption, as did all the cases in which the Court has applied the irrebuttable presumption approach.

There is a certain rigidity in the Court's reading of its prior cases. Its assumption that equal protection cases fall neatly into two categories ignores substantive difficulties in previous cases. *Reed, Baird,* and, to a lesser extent, *James, Humphrey,*[207] and *Weber,* were all avowedly rational basis cases but contained analytic techniques foreign to the minimal scrutiny standard. To refer to these cases as adopting strict judicial scrutiny, as the *Frontiero* plurality did with regard to *Reed,*[208] and the Court has done with *Weber,*[209] is a real failure to come to grips with the possibility of an intermediate standard of equal protection review. Nevertheless, *Rodriguez* and *Frontiero* indicate a clear disposition on the part of the Court to adopt an exclusively two-tiered approach[210] and to interpret past cases accordingly. The Court's opinion in *Boraas* confirms this tendency.

It could be argued that *Rodriguez* shares many common features with the seven *Boraas* precedents. It involves the fringe areas of strict scrutiny (a possible fundamental right, education; and a sometimes suspect group, the poor)[211] and was, therefore, an appropriate case in which to employ some type of heightened scrutiny.[212] The *Boraas*

To say that the Belle Terre ordinance contains an unconstitutional conclusive presumption that all nonconsanguineous groups cause more traffic, noise, and other assorted problems than traditional families, when the presumption does not appear in the ordinance, is to appreciably extend the irrebuttable presumption technique.

LaFleur is further distinguishable. While the Court does use the "irrebuttable presumption" language, the case is similar to Roe v. Wade, 410 U.S. 113 (1973). Both are decided under the due process clause; both involve women and the right to have children; and both explicitly recognize the right as tied to the fundamental right of personal privacy. It seems that *LaFleur* fits into the large class of cases that deal with important personal rights and that, as a result, use a strict scrutiny approach. In effect, when applying the label "irrebuttable presumption," the Court is drawing conclusions after closely scrutinizing the means-end relationship, looking for less onerous means, and finding that no compelling interest was involved.

An unrestrained use by the Court of the "irrebuttable presumption" approach could lead to its completely supplanting equal protection analysis. Virtually every legislative classification presumes that certain individuals fall within or without a classification, so that any individual who falls within a classification, but who does not in fact further the classification's objective, could challenge the legislation on the ground that it created an irrebuttable presumption. Such an argument is not usually possible on equal protection grounds, because it is a basic tenet of equal protection adjudication that "classifications need not be made with mathematical precision." Dandridge v. Williams, 397 U.S. 471, 485 (1970), *citing* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

207. *See* text accompanying notes 69-71 *supra.*

208. *See* text accompanying note 120 *supra.*

209. *See* text accompanying notes 92-93 *supra.*

210. Justice Stewart's concurring opinion in *Rodriguez* is the most succinct explication of this approach. *See* 411 U.S. at 59-62.

211. *See* Brown v. Board of Educ., 347 U.S. 483 (1954) (education). The majority in *Rodriguez* suggested that complete deprivation of a generally held right because of impecuniousness could call for strict judicial scrutiny. 411 U.S. at 20-22.

212. There is precedent for applying the compelling interest test in situations where both a near fundamental right and a near suspect class are involved in the same case.

precedents seemed to be focusing review on the grounds of distinction between similarly situated groups. If this approach had been applied in *Rodriguez,* the Court would have isolated the disparities in per-pupil expenditures based on property tax revenues and then required some showing by the state to justify the differential treatment between districts. The Court did note the unequal expenditures in the Edgewood district, compared with more affluent districts,[213] and looked only to the record to explain the differential treatment; it refused to hypothesize a justification. It also could be argued that the Court carefully examined the workings of the state system and only found a rational basis for the distinction to exist when the strong state interest in local control of education was shown to be furthered by this mode of financing.

However, this analysis would overlook the deference paid to the state's arguments and the Court's insistence on applying the traditional formula to the case. The *Boraas* precedents, in their summary refusal to consider conceivable grounds of distinction between groups, appeared to place a burden on the state to justify differential treatment. Any burden in *Rodriguez* was clearly on the appellees. The Court indulged a presumption of legislative validity, agreed without concrete demonstration with the state's argument that local control was furthered by the financing plan,[214] and never accepted the appellees' basic premise that reduced expenditures led to a corresponding reduction in quality of education.[215] The inescapable conclusion is that the equal protection test announced in *Boraas* simply does not exist, or no longer exists, and that future adjudication will be within the parameters of the two-tier approach.

Soon after the *Boraas* opinion appeared, a poll of all the Second Circuit judges was taken as to whether the case should be reheard en banc.[216] The petition was denied by a four-four vote. Immediately after this poll *Rodriguez* was handed down. Judges Timbers and Mansfield, writing after *Rodriguez,* took the opportunity to comment. Judge Timbers wrote that

> the Supreme Court's very recent decision in [*Rodriguez*] strongly indicates that the traditional minimal scrutiny equal protection

Thus, in Douglas v. California, 372 U.S. 353 (1963), and in Griffin v. Illinois, 351 U.S. 12 (1956), the presence of the interest in criminal appeal and the classification based on ability to pay may have induced the court to scrutinize strictly the classification involved.

213. 411 U.S. at 13-14, 46.

214. *See* 411 U.S. at 50-54.

215. "On even the most basic questions in this area the scholars and educational experts are divided. Indeed, one of the major sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education—an assumed correlation underlying virtually every legal conclusion drawn by the District Court in this case." 411 U.S. at 42-43.

216. 476 F.2d at 824.

> standard should have been applied in the instant case. In *Rodriguez*, the Court held that "the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes," should be applied . . . . In short, the Court refused to "intrude in an area in which it has traditionally deferred to state legislatures." State or local decisions regarding limitations on the use of land traditionally have been accorded this same great deference by federal courts for the same reasons a state's handling of public expenditures are not to be disturbed . . . . In the light of *Rodriguez*, it seems to me that *a fortiori* the decision in the instant case, which surely constitutes a substantial interference with a municipality's zoning policies, was erroneous.[217]

Judge Mansfield replied,

> [In *Rodriguez*,] the Court, following a well beaten path used in review of certain types of economic discrimination, applied "the traditional standard of review" to state legislation of an essentially economic nature, which was challenged because of its social consequences.[218] Here we are not concerned with commercial legislation but with a local ordinance directed squarely against the personal right[219] of individuals to associate and live together . . . .[220]
>
> If anything, our decision here is in accord with the Supreme Court's decision in *Rodriguez*. In describing the standard applied by it, the Court there stated that . . . "the traditional standard of review. . . requires only that the State's system be shown to bear some rational relationship to legitimate State purposes" . . . . These statements not only are consistent with our review but would require us to nullify the Belle Terre ordinance for failure to further any legitimate zoning objective.[221]

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217. 476 F.2d at 826-27. *Rodriguez* is, however, an example of a particularly complex problem, in which "considerations of judicial competence" could partly explain the noninterventionist stance of the Court. *See* note 147 *supra*.

218. Even granting *arguendo* that the legislative scheme was essentially economic in nature, nothing in *Rodriguez* indicates any intention to limit traditional review to such cases.

219. Justice Stewart has raised doubts as to the constructiveness of pursuing the property right-personal right distinction that Judge Mansfield suggests:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a saving account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972). *See also* Goldberg v. Kelly, 397 U.S. 254 (1970); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

220. The *Boraas* majority specifically stated that it was not ruling on claims of privacy. 476 F.2d at 814. Judge Mansfield's statement suggests that the majority actually balanced the rights affected and the legislative purpose, despite its disavowal of such an approach.

221. 476 F.2d at 828-29. The Supreme Court found that the ordinance furthered a series of legitimate objectives. 42 U.S.L.W. at 4477. *See* note 34 *supra*.

Judge Mansfield's argument, however, seems ingenuous. The *Rodriguez* Court's presumption of legislative validity was manifested by a clearly deferential stance towards legislative enactments, and, in determining whether the requisite rational relationship existed, the Court stated that imperfect classifications are acceptable. *Boraas*, while stating that the ordinance did not appear to be supported by any rational basis, reached the conclusion by applying a different equal protection test, by rejecting other possible zoning objectives, and, apparently, by requiring that no less onerous means be available. In spite of a bare holding utilizing words similar to the *Rodriguez* standard, the rationales of the two cases are not consistent.

IV. *Boraas* Under Traditional Standards of Review

Two arguments remain under which the Second Circuit might be said to have found the ordinance to be unconstitutional under traditional standards: The classification might be found to be either underinclusive or overinclusive to the point of arbitrariness.

Boraas could be read as accepting the view that the classification at issue was unconstitutionally underinclusive in that it excluded some persons who would also contribute to the problems to which the ordinance was directed. The court appeared to reject the argument that members of unrelated groups would be more likely to cause traffic, parking, and congestion problems than members of a traditional family. Quoting from *Trottner*,[222] it noted that a case dealing with a *Boraas*-type of ordinance, *Palo Alto Tenants Union v. Morgan*,[223] considered the same arguments and found a rational relationship between the classification and the zoning goals. That court held that no irrationality was involved:

> [G]iven the fact that the average size of even the traditional family is *less* than four members, the [c]ourt sees no arbitrariness in limiting the number of unrelated persons living in an R-1 dwelling, while not so limiting the size of the traditional family in such dwellings. . . .
>
> . . . Noise, traffic problems, and overloaded parking facilities may tend to result when one-family homes become communal dwellings.
>
> . . . Often owners find it more profitable to rent these dwellings, not to single families, but to large groups of unrelated persons with independent sources of income. Such groups are able to pay, collectively, far more in rent than can traditional families with one, or at best two, wage earners. Thus the rent structure of a whole neighbor-

222. *See* text accompanying notes 41-42 *supra*. It should be noted, however, that the holding in *Trottner* was not that the ordinance violated the due process clause or equal protection clauses, but that the zoning enactment was outside the scope of the Illinois enabling statute. This maneuver is not available in *Boraas*, since New York state courts have upheld identical ordinances. *See* City of Schenectady v. Alumni Assn., 5 App. Div. 2d 14, 168 N.Y.S.2d 754 (1957); Town of North Hempstead v. Griffin, 71 Misc. 2d 864, 337 N.Y.S.2d 318 (Sup. Ct. 1972).

223. 321 F. Supp. 908 (1970) *aff'd.*, 487 F.2d 883 (9th Cir. 1973).

> hood may be affected by opening R-1 zones to large, unrelated living groups.[224]

The court also observed that the state had a clear interest in preserving the integrity of the biological and legal family,[225] so that any favoritism regarding traditional families was not an indication of arbitrariness.[226]

The underinclusion argument presents a difficult question. While it is hard to say that in no case will unrelated groups cause more problems than traditional families,[227] surely the *Trottner* opinion is correct in saying that in many instances traditional families cause the same problems. For instance, the ordinance would allow groups of blood-related individuals, regardless of group size or degree of relation, to occupy the same structure. Nevertheless, after *Rodriguez*, the *Palo Alto* decision, rather than *Boraas*, appears to be the analysis that will be followed. *Rodriguez* states that "the existence of 'some inequality' in the manner in which the State's rationale is achieved is not alone a sufficient basis for striking down the entire system,"[228] and both *Boraas* and *Trottner* admit that unrelated groups do cause more noise, traffic, and congestion in some cases. It therefore cannot be said the classification lacks any rational basis.

Nor does the decision in *United States Department of Agriculture v. Moreno*,[229] in which the Supreme Court found a statutory scheme similar to the one in *Boraas* unconstitutional, necessarily alter this reasoning. *Moreno* involved the Department of Agriculture's food-stamp program. Eligibility was determined on a "household" basis, and Congress redefined "households" to exclude groups of unrelated individuals.[230] The Court found the definition unrelated to any statutory objective. The two stated purposes of the food-stamp program were improvement of the agricultural economy through use of surplus commodities and the alleviation of malnutrition. The Court did not deal with the possible right of association involved and, in traditional equal protection language, held that "[t]he challenged classification . . . is clearly irrelevant to the stated purposes of the Act. . . . '[T]he relationships among persons constituting one economic unit and

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224. 321 F. Supp. at 912-13.

225. 321 F. Supp. at 911.

226. The court also rejected plaintiff's argument that the case should be decided under the strict scrutiny standard because their fundamental right of association was being adversely affected. 321 F. Supp. at 911-12. That issue was not reached in *Boraas*.

227. However, the argument that unrelated persons typically own more automobiles than members of related groups and thus pose additional parking and traffic problems might be legitimate.

228. 411 U.S. at 51.

229. 413 U.S. 528 (1973).

230. 7 U.S.C. § 2012(e) (1970). An exception was made for unrelated individuals over 60 years old.

sharing cooking facilities have nothing to do with their abilities to stimulate the agricultural economy . . . or with their personal nutritional requirements.' "[231]

The Court then tried to justify the classification by relating it to an imputed legislative purpose. The argument was made that the classification was rationally related to the legitimate governmental purpose of preventing fraud in the food-stamp program, because households of unrelated persons might contain more individuals who would fail to report income sources. The Court differed from the Gunther model in that it was willing to discuss this hypothetical objective, but it found the classification not rationally related to the objective for two reasons: The Court said that the Food Stamp Act already contained criminal provisions, so it was doubtful that fraud prevention was, in truth, the objective of the new provision.[232] The Court then noted that the practical operation of the provision had no effect on fraud because, by no longer purchasing food with the others or by using separate cooking facilities, an individual could establish himself as a separate "household" and still conceal income so as to remain eligible for food-stamp benefits.[233] While agreeing that a classification need not be drawn with "precise mathematical nicety" to be sustained, the Court concluded that the classification in question was not only imprecise, but without any rational basis.[234] The Court did rely on the information before it to reach this result and did not simply accept any conceivable relationship, but, as in *Jackson*,[235] the case indicates that where the information before it leads to a definite conclusion a court will accept that conclusion, rather than a conceivable relationship shown to be inapplicable. No similar analysis is available in *Boraas*.

Moreno differs from *Boraas* in that the objectives in the two cases are entirely different. A finding that the denial of food stamps to groups of unrelated persons is grossly underinclusive for dealing with the alleviation of malnutrition does not control a decision as to whether the same type of classification is grossly underinclusive when applied to zoning goals. In spite of the virtual identity of the classification in the two cases, the legal issues are unconnected.

Boraas briefly mentioned classificatory overinclusion as a possible reason for voiding the Belle Terre law but seemed to equate that approach with less onerous means analysis.[236] The *Boraas* majority

231. 413 U.S. at 534, *quoting* Moreno v. United States Dept. of Agriculture, 345 F. Supp. 310, 313 (D.D.C. 1972) (three-judge court).

232. 413 U.S. at 536-37. The reasoning is reminiscent of *Baird*. *See* 405 U.S. at 452.

233. 413 U.S. at 537.

234. 413 U.S. at 538.

235. *See* text accompanying notes 62-68 *supra*.

236. *See* 476 F.2d at 817.

might have found that the classification swept in so many individuals who were not causing traffic, noise, or parking problems that it was arbitrary. For example, the ordinance might have prevented three maiden ladies, three clergymen who only owned bicycles, or three judges from living in the same home. The court may have had this approach in mind, as the only case cited as support in the less onerous means section of its opinion was the New Jersey case of *Kirsch Holding Co. v. Borough of Manasquan*.[237]

Kirsch involved a zoning ordinance, similar to that in *Boraas*, that was promulgated by a summer-resort community in an attempt to prevent "uninhibited social conduct of many such group rental occupants . . . [including] excessive noise at all hours, wild parties, intoxication, acts of immorality, lewd and lascivious conduct and traffic and parking congestion."[238] Although the existence of these problems was an established fact, and the ordinances would effectively abolish this type of group rental, the court struck down the ordinance as arbitrary and unreasonable. The due process clause was utilized as the standard of review, and the court stated the test as follows:

> [S]ubstantive due process demands that zoning regulation . . . must be reasonably exercised—the regulation must not be unreasonable, arbitrary or capricious, the means selected must have a real and substantial relation to the object sought to be attained, and the regulation or proscription must be reasonably calculated to meet the evil and not exceed the public need or substantially affect uses which do not partake of the offensive character of those which cause the problem sought to be ameliorated.[239]

The court found that too many innocuous groups were excluded from the ordinance's definition of family, so the ordinance was not upheld.[240]

The case might be distinguished from *Boraas* because of its resort context and because of the fact that the Belle Terre law was not aimed at prohibiting specific antisocial conduct, but was designed to further more general police power goals. However, the New Jersey supreme court discussed the *Trottner* opinion favorably and also criticized an earlier New Jersey case [241] that had upheld a blood-related family or-

237. 59 N.J. 241, 281 A.2d 513 (1971).

238. 59 N.J. at 245, 281 A.2d at 515.

239. 59 N.J. at 251, 281 A.2d at 518.

240. To the same effect, see Gabe Collins Realty, Inc. v. City of Margate City, 112 N.J. Super. 341, 271 A.2d 430 (1970); Larson v. Mayor & Council, 99 N.J. Super. 365, 240 A.2d 31 (1968).

241. City of Newark v. Johnson, 70 N.J. Super. 381, 175 A.2d 500 (1961), in which single-family-dwelling owners had been convicted of violating an ordinance because they had boarded unrelated children in their home. The children were wards of the State Board of Child Welfare. The ordinance was upheld as rationally related to the prevention of over-congestion. A statute would now require a different result. *See* N.J. STAT. ANN. 40:55–33.2 (1967).

dinance in a purely residential setting. Applied to *Boraas*, the overinclusion argument would almost amount to an issue of fact: whether the overinclusion was of such a substantial degree that the *Rodriguez* imprecation, that inexact classifications must be tolerated, is surmounted.[242] The overinclusion argument provides a possible, but somewhat tenuous, ground with which to justify the *Boraas* decision.[243]

Ironically, the standard of review offering the most promise of overturning the Belle Terre ordinance, was not an up-to-the-minute strict scrutiny equal protection offshoot but the tried and true minimal rationality formulation. Nonetheless, the Supreme Court found that the ordinance met the minimal rationality standard.[244] The Court had the opportunity, which it ignored in both *Boraas* and *Rodriguez*, to deal with the possible existence of a new equal protection test. This failure indicates the Court's resolve to adhere to two-tiered equal protection. While the Court's failure to discuss the test is to be decried, the Second Circuit's own *Boraas* opinion points out the ad hoc and unprincipled nature of the nascent equal protection test that, in the end, appears to have been stillborn.

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242. An argument based on overinclusion can be encompassed within the equal protection clause. *See Developments in the Law—Equal Protection, supra* note 13, at at 1086-87. *But see* note 181 *supra*.

243. Vlandis v. Kline, 412 U.S. 441 (1973), which found a statutory definition creating an "irrebuttable presumption" arbitrary by and large because it included too many nonconforming members within the classification with no opportunity to revise their status, would support the overinclusion approach of *Kirsch*. As previously noted, however, the exact parameters of the irrebuttable presumption language have yet to be determined. *See* note 206 *supra*. In some respects, the *Kirsch* decision goes beyond *Vlandis*, for *Vlandis* contained express findings of no relation between the statutory definition and any legitimate state objective, while the New Jersey court conceded the relation of means to ends but nevertheless deemed the ordinance overinclusive to the point of arbitrariness.

244. 42 U.S.L.W. at 4477.